CROSS-EXAMINATION OF WITNESSES

Wilbur J. Bridges
July 22, 1929

Cross Examination:-

1. What are the issues?
2. Dope out the probabilities.
3. Is the witness telling the truth?

Pre-Court room preparation

Investigate beforehand every important witness.

While sitting in Court listening to direct examination decide whether to attack witness or not.

a. No. Then if harmful, cross-examine by emphasizing facts, if favorable, with testimony.

Investigate important witnesses in advance.

b. Yes. Go easy or don't cross-examine at all. "Apparent" cross examination or attack witness personally. False bravado, etc.

develop helpful admissions

YB 9 10/16/31 FW Lehman - Paul James.

Don't Ask "Why" - Opens the doors wide.

Don't open up a conversation or correspondence unless you can hurt your case. Don't ask him any question unless he will give the true answer, or if he gives the wrong answer you can prove him wrong by evidence at your command.

Cf. Am. Jurisprudence of Cross in State v. Wheelock

No Rule: If your case is lost you can, with safety, take chances. Otherwise, Know where you are going and drive to that end. James: To know where you are going you must be familiar with the issues of

THE CROSS-EXAMINATION OF WITNESSES

RULES, PRINCIPLES AND ILLUSTRATIONS

By

ASHER L CORNELIUS

Author of "Search and Seizure"

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PREFACE

To become proficient in the art of cross-examination requires a lifetime of study and practice for any lawyer. Its foundation principles are as deep and infinitely varied as human nature itself. No one has ever completely mastered it. Regardless of skill or experience in the trial of cases, an attorney can not reach the point where he may not receive valuable suggestions from others on the subject.

This book is, therefore, primarily composed of suggestions for the lawyer, written especially for those younger members of the legal profession who are ambitious and who do not hesitate to add to their attainments whenever the opportunity affords. No assumption is made that the author has, by any means, exhausted this theme.

In this volume two separate divisions of thought are presented for the consideration of the reader. In the first is outlined the principles governing cross-examination as evolved and developed through time and custom; the proper methods applicable thereto, together with the causes therefor and the effect thereof, and the psychological principles upon which the conclusions contained herein are based. In the second, examples from famous cases are exhibited, beginning with the earliest preserved records of questions and answers occurring in the old English State trials and gradually descending to the present, including matters now awaiting ultimate judicial determination. In perusing these carefully the course of the gradual evolution of the fundamental ten-

ets of cross-examination can be readily discerned and the changes and the reasons therefor seen.

The author desires to especially acknowledge his indebtedness to William Henry Gallagher and Frederic T. Harward of the Detroit Bar and Henry M. Spaan of the Indianapolis Bar, who so generously furnished material for inclusion herein.

ASHER L. CORNELIUS.

Detroit, Michigan,
May 15, 1929.

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CROSS-EXAMINATION

INTRODUCTION

All writers upon the subject of cross-examination emphasize its paramount importance as a means of sifting out the truth in the trial of cases. Every lawyer, who has attained any degree of success in the courtroom, will assert its imperative necessity in revealing the whole truth relative to a given point in question and of exposing falsehood in legal controversy. Likewise experience has shown that detective bureaus and police departments are, for the most part, able to secure admissions of guilt and subsequent convictions from suspected criminals by interrogating them regarding statements made by them with reference to known facts inconsistent therewith.

Notwithstanding the conceded importance of cross-examination, both in and out of court, there is scant literature available, either on the art thereof, or the underlying psychological principles upon which same is based. This situation is accounted for by the fact that much involved in skill in cross-examining must be acquired from experience and can not be easily communicated by the printed page. The author of this treatise does not hesitate to say, however, that a great deal can be learned from an adequately prepared text thereon and that the art and science of cross-examination are based upon certain unvarying psychological principles. The attempt is herein made to set up a few of these guide posts; to

illustrate theories discussed with actual illustrations taken from court records; and to state, in many instances, what should be done as well as what should be avoided in cross-examinations both within and without the range of judicial proceedings.

The youthful barrister is cautioned however, against expecting to master what this book has to teach by a casual reading. The precepts discussed and illustrated in the following pages will be valuable to the practicing attorney only so far as they are thoroughly assimilated and made a part of his working knowledge.

PART I

Principles of Cross-Examination

CHAPTER 1

PREPARATION IN ADVANCE OF TRIAL

Where important issues are involved, the cross-examination in the great majority of cases can and should be prepared in advance of the trial. This does not necessarily mean that the actual questions for submission therein need be formulated, although frequently this may be profitably done, but a general outline and plan with its various objectives and methods of approach should be considered and tentatively decided upon and set down in advance of the hearing. Of course, the exigencies of the trial itself may require counsel to adopt a line of attack entirely apart from the one anticipated, but, even so, the thought and reflection given to the various angles and probabilities of the case in the original scheme will be found helpful.

The controversial features of a lawsuit usually may be reduced to few in number and in preparing to meet them, the attention of the lawyer should be directed especially toward these disputed phases. In planning a cross-examination, therefore, the first step is to make note of those portions of the evidence which are likely to be contradicted, and to particularly prepare for that evidence upon which it is necessary to rely to win a case or establish a defense.

Issues joined on what facts?

A careful study of the pleadings and a survey of the evidence which the adverse party will probably introduce in support of his contention almost invariably enables opposing counsel to forecast, with considerable accuracy, the trend which the testimony of the opposing witnesses will likely take. Thus in making a plan, counsel should prepare a statement of these probabilities which he may use advantageously as a foundation for the questioning of any number of adverse witnesses provided they testify contrary to the probabilities thus worked out. For example, consider the following actual case:

A purchased an apartment house from an owner B for $65,000 and paid $15,000 down, leaving a balance of $50,000 to be paid on the contract at the rate of $600 per month. A claimed that the owner B, from whom he purchased the property, misrepresented the facts in this transaction, in the following particulars:

(a) That the rentals from this property of $700.00 per month had been reduced so that they were at absolute bed-rock at the time the transaction was closed and that all of the tenants were prompt in paying same, and that an expenditure of only about $300 per annum was required for heat.

(b) That the owner represented that all of the apartments were in good repair as to decorations; that the building would easily carry the contract and pay for itself out of the rentals.

A purchased the property, entered into possession and discovered the following facts:

1. That it cost him $250 per month for heat;
2. That the tenants were not prompt in paying rent;
3. That heating plant required $500 repairs immediately;

4. That the property lacked approximately $300 per month of paying for itself from the rentals.

A brought suit for rescissions against B. The defendant in his answers denied that he made any such representations as above set out.

What, now, are the probabilities in this case? The lawyer for the plaintiff, in planning his cross-examination of the defendant and his witnesses should reach the following conclusions respecting the same:

STATEMENT OF PROBABILITIES

A v. B

(1) A as a purchaser would be vitally interested in knowing what income the apartment produced. B the owner, had that information. A did not. The probabilities, therefore, strongly support the contention of A that he asked for this information. If B had given him the actual facts he would have refused to purchase the property. So here again, the probabilities support A that B misrepresented the income.

(2) Since heating costs of large apartment buildings vary widely, depending upon the efficiency of the heating plant as well as upon the construction of the building, the probabilities are strongly with A when he stated that he asked B what said cost would be and B told him. If B made any representations at all about the heating costs of the apartment, it would have to be a representation consistent with the purchase of the building by A. Had B told the real facts, A would not have purchased.

(3) As to the condition of the interior decorations, the individual apartments being all rented, A did not have access to them and he was compelled to depend on B for information. Here again a true disclosure would, in all probability, have blocked the deal.

(4) Since the tenants in the building were none of them prompt paying and since A naturally would be interested in making inquiries as to their character, the probabilities are that A did inquire and that B concealed and misrepresented the real facts.

Since one of the important objectives in cross-examination is to show that the witness is not testifying truthfully, one forceful method of doing this is to show the improbability of his story by emphasizing facts before the jury which render such story improbable. Counsel, therefore, cross-examined the defendant in this case as follows:

Q. (Addressed to the defendant on the witness stand.) "You, as the owner and operator of this property, knew the annual cost to heat this building?"

A. "Yes, sir."

Q. "The heating costs of apartment buildings vary widely do they not, depending upon the condition and efficiency of the heating plant and the construction of the building?"

A. "Yes, sir."

Q. "You had exact information as to what it cost to heat this building?"

A. "Yes, sir."

Q. "Mr. A, your prospective purchaser, had no information as to what these costs were?"

A. "No, sir."

Q. "And he, as a prospective purchaser of this building, would naturally be very much interested in knowing what these heating costs were?"

A. "Yes, sir."

Q. "You were ready to answer his questions in this regard?"

A. "Yes."

Q. "And yet he asked you nothing about this important subject?"

A. "No, sir."

The same general line of questions were successfully applied to all the claimed misrepresentations in the foregoing statement of facts.

Again, take the case of Kaminski v. Kadowski, recently tried. The facts in this case were, briefly, as follows:

Frances Kaminski alighted from a street-car and was standing in the safety zone. She was struck by defendant's automobile and knocked to the pavement and seriously injured. The automobile was travelling the same direction as the street-car. Several witnesses for the plaintiff testified that the plaintiff was standing in the safety zone when the defendant, driving rapidly, ran into her. There were four persons in the automobile. Plaintiff's witnesses also testified that the street-car had not started up again when the plaintiff was struck. Interviews with the persons in the automobile who would undoubtedly appear as witnesses at the trial for the defendant, disclosed the fact that they would testify that the plaintiff had taken three or four steps from the safety zone and stepped in front of the car. They also stated that the defendant stopped his automobile back of the street-car, and that the plaintiff was walking slowly at the time she was struck. The distance from the safety zone to the curb was eighteen feet; that from the door of the street-car through which the plaintiff had alighted to the rear of the car, was fourteen feet. An ordinance was in force in the City of Detroit, where the accident occurred, requiring all automobiles to stop in the rear of street-cars when and where the passengers were alighting.

Counsel prepared, in advance, the following statement of probabilities for the cross-examination of the defendant and his witnesses:

STATEMENT OF PROBABILITIES

KAMINSKI v. KADOWSKI

(1) Since all the witnesses in the defendant's car stated when interviewed prior to the trial, that defendant stopped behind the street-car, we may tentatively assume that the defendant himself will so testify at the trial of the case. He must do so or admit that he did not stop his automobile back of the street-car, which would be an admission that he had violated the city ordinance.

(2) Assuming that the defendant did stop back of the street-car, which his witnesses will say was a distance of about eight feet, the defendant starting his automobile from a standing position must have travelled one-half of the length of the street-car, fourteen feet plus eight, making twenty-two feet before colliding with the woman. The woman, walking slowly had travelled three or four steps. Consequently, she must have started for the curb before the car started.

(3) If the plaintiff started for the curb before the automobile moved, it would be negligence on the part of the defendant to start his car and run into her.

(4) If the witnesses for the defendant testify that the automobile was travelling rapidly, defendant would be still negligent for increasing the speed of the car while the woman was travelling to the curb in plain view. If, on the other hand, they testify that the automobile was travelling slowly, the defendant would be negligent in failing to stop and thus avoid colliding with the woman. Cross-examination of this particular de-

fendant and his witnesses should then be undertaken with these objectives in view, to show:

(a) The distance the defendant stopped back of the street-car.

(b) The length of the street-car and the distance the defendant travelled before striking the woman.

(c) The speed at which the woman was walking, that she was travelling slowly and had taken three or four steps.

(d) The speed at which the car travelled after it started. Compare it with the speed at which a person usually walks—slow walker two miles an hour, fast walker four miles an hour, so that if the woman was walking slowly, the automobile was going from twelve to fifteen miles per hour and would be travelling six or seven times as fast as the woman.

The actual questions put to the defendant in this case on cross-examination, were:

Q. "A fast walker will walk four or five miles an hour, will they not?"

A. "I guess so."

Q. "And a slow walker about two miles per hour?"

A. "Yes, sir."

Q. "What speed was your car going after you had started up just before you put on your brake before striking the woman?"

A. "About twelve miles an hour."

Q. "How quickly could you stop your car going at twelve miles an hour?"

A. "About three feet."

Q. "How far was the woman away from the safety zone when you struck her."

A. "About seven or eight feet."

Q. "Was she walking rapidly or slowly?"

A. "I couldn't say."

Q. "If she had been going slow, she would have been travelling about two miles per hour?"

A. "Yes, sir."

Q. "If you are travelling twelve miles an hour, you would be travelling six or seven times as fast as she was?"

A. "Yes, sir."

Q. "So that while she was travelling six or seven feet from the safety zone you would be travelling forty to fifty feet with your car?"

A. "I suppose so."

Q. "Please do not suppose. Isn't it a fact, that if you were going twelve miles an hour and she was walking slowly and going about two miles per hour you would be travelling six times as fast as she was travelling?"

A. "Yes, sir."

Q. "And that is about the speed she was travelling."

A. "Yes, sir."

Q. "And so she had travelled seven or eight feet out of the safety zone before you struck her?"

A. "Yes, sir."

Q. "And since you travelled only twenty-two feet, she must have started from the safety zone before you started your car after making the stop behind the street-car?"

A. "Yes, sir."

Q. "But, you did not see her?"

A. "No, sir."

Q. "Then, you did not see her until she got near the front of your car?"

A. "Yes, sir."

Q. "What reason could you give for not having observed this lady as she must have been crossing the street ahead?"

A. "I only know that I did not see her."

The foregoing answers plainly constituted an admission of negligence on the part of the defendant.

In most cases it is even possible to determine in advance of the trial whom the adverse party will call as witnesses to support his contentions. Where the litigation is important the character, reputation and antecedents of the main witnesses of the adverse party should be investigated thoroughly. It is a most important advantage to the cross-examiner when he faces a witness to have accurate information in regard to his habits of thought, his business and social associates and his outlook on life, and whether or not he has in the past been involved in any shady or questionable transactions which might bear upon his credibility as a witness. There are times when the lying witness is thoroughly confounded by a question which indicates an intimate knowledge of his past life. Or again, where a witness has something to hide, a lawyer, although possessing accurate information in regard thereto, may approach the subject apparently as an entire stranger, whereupon the witness will almost invariably falsify concerning this, believing his record is unknown to the adverse party, and when a witness once perjures himself and the jury believes that he has done so wilfully, even though it be concerning an immaterial matter, he is thereby thoroughly discredited.

As an illustration, take an example from a case tried recently in the Wayne Circuit Court of Detroit. A woman had been called to the witness stand and had given important testimony for the plaintiff. In advance of the trial, counsel for the defendant had thoroughly investigated her record and had found that her husband was living but that she had been separated from him for the past nine years; that she had never obtained a divorce but for the past six years had been keeping house for a

man by the name of Saxon. This witness had no reason to suspect that counsel for the defendant was possessed of this information. On cross-examination she was asked:

Q. (Counsel for defendant feigning absolute ignorance.) "Let me see, did you say you were a Miss or a Mrs.?"

A. "A Mrs. I am a widow."

Q. "When and where did your husband die?"

A. (With some signs of embarrassment.) "I just can't exactly tell you."

Q. "Don't you know when and where your husband died?"

A. "I don't know the exact date but I heard he was dead."

Q. "As a matter of fact, your husband is living is he not?"

A. "I don't know that he is living."

Q. "As a matter of fact, he is working for Parke-Davis & Co., is he not?"

A. "I know that he was once but I don't know whether he is now or not."

Q. "Who told you he was dead?"

A. "I don't remember." (The witness was now showing considerable signs of embarrassment.)

Q. "You know John Saxon?"

A. "Yes, sir."

Q. "You are working for him?"

A. "Yes, sir."

Q. "What are you doing for him?"

A. "Working as a housekeeper."

Q. "How long have you worked for him?"

A. "Seven or eight years."

Q. "How large a family has he?"

A. "No one but himself."

Q. "How often has he moved during the time you have been working for him?"

A. "Three or four times."

Q. "And you have always moved with him?"

A. "Yes, sir."

Q. "Do you call yourself Mrs. Saxon?"

A. "No, sir."

Q. "Does anybody else call you Mrs. Saxon?"

A. "I can't help what they call me."

It will thus be seen that this witness was discredited because she falsified about immaterial matters. Had her record not been investigated in advance, her cross-examination might have been unsuccessful.

CHAPTER 2

GENERAL PRINCIPLES

From the time a witness rises to be sworn until the close of his testimony he should be carefully studied by opposing counsel, not only as to the substance of what he says, but as to his manner and attitude on the stand. The adverse attorney should be ever alert for inconsistencies or discrepancies in evidence thus offered and he should weigh and compare it with the actual facts of the case. Study should be made of the countenance of the witness to discern what sort of character is thereon written, and note made as to whether his speech is frank and open or shifty and evasive. In short, counsel should so thoroughly have sized up his man by the time he is told, "Take the witness," that he will have been able to reach certain conclusions in regard to how the cross-examination should be conducted. First of all, he should ask himself: "Has this witness testified to anything that will hurt my cause?" "Is it necessary to shake his story?" No matter whether or not the testimony has been untruthful, if it is harmless, the witness should be dismissed then and there, unless counsel be of the opinion that the latter knows some additional fact that will benefit the case, in which event, a cross-examination should be conducted for this purpose alone. Time after time, ill-advised lawyers bring out strong evidence for their adversaries where, in the direct examination, little or nothing of importance affecting either side was shown. In the great majority of cases, however, the witness will have testified to something detrimental to counsel's case and before proceeding with the cross-examination, the

1. Shall I cross-examine at all?

latter should make up his mind, if possible, whether or not the witness has wilfully lied. If he has, an entirely different mode of attack will be required than if he has erred or even has been guilty of an honest error. It should be remembered in this connection that almost all witnesses are biased in favor of the party calling them. Often the party who first sees a witness and goes over his side of the case with him will arouse sympathy in his favor and thereafter such witness will be an active partisan in his behalf.

Such pertinent facts as these should be nearly always brought out: Is the witness a friend of the adverse party and, if so, what is the intimacy of the relationship; is he interested financially with said party; has he attended the trial without a subpoena; was he paid his witness fees; if he attended the trial without a subpoena, why did he do so; has he ever met the adverse party socially; what were the opportunities this witness had to observe the facts to which he has testified? This last would include distances from the scene of an accident, if an accident were the subject-matter of his testimony; the condition of the witness' eyesight; the distinctness with which objects could be observed, and if the relating of a conversation is involved, the remoteness of time therefrom, or the inability to recall anything else that was said on the same occasion. The force of testimony may be weakened by showing either that the one giving same has been convicted of crime or has had a disreputable, shiftless or indolent past.

Lawyers in conducting effective cross-examinations, vary widely in their attitude and manner. Some have achieved a measure of success by adopting a sarcastic and brow-beating attitude, but this method more often harms than it does good. Jurors are quick to sympathize with anyone who is being dealt with unfairly. Roar-

ing at a witness and attempting to brow-beat him, without actually disclosing weaknesses, discrepancies or improbabilities in his testimony will quickly cause the jury to take his side. Occasionally, however, the brow-beating method can be used successfully and with startling results. In one instance a defendant by the name of Lemersall was being tried for breaking and entering and stealing a quantity of cigarettes. Two of his alleged partners in the crime had already pleaded guilty and had been sentenced to terms in prison. Thinking that they could help Lemersall by shouldering the blame entirely, one of them, Smith by name, took the stand at the trial of Lemersall and gave testimony as follows:

Direct examination.

Q. "You and your partner X entered the house at 417 Fourteenth Avenue on the seventh day of September and stole a certain quantity of cigarettes?"

A. "Yes, sir."

Q. "Was Lemersall with you on this occasion?"

A. "No, sir."

Q. "Had you told Lemersall previous to this burglary that you intended to enter these premises?"

A. "No, sir."

Q. "Did Lemersall have anything whatever to do with entering these premises or any connection whatever with this burglary?"

A. "He did not."

Thus far all was well. The witness had answered these questions in a straightforward manner and had created an excellent impression on the jury. At the conclusion of the direct examination, the prosecutor, Van H. Ring of the Detroit Bar, rose slowly to his feet and gazed sternly at the witness with a reproving look on his face,

his entire attitude seeming to say "How dare you tell such a monstrous lie?" As he gazed at the witness, the courtroom gradually became quiet until, at the expiration of a few moments, one could have heard a pin drop. The prosecutor continued to gaze fixedly at the witness while the atmosphere of the courtroom grew more tense every moment. The witness began to shuffle uneasily in his seat. The prosecutor said nothing but continued to gaze doggedly at the witness. The tension of the courtroom became almost unbearable. Every eye was riveted upon the witness. Suddenly, the prosecutor roared at the top of his voice "Charles Smith, you are lying!" and at the same time sprang forward and landed directly in front of the witness and about three feet from him looking him directly in the eyes. He then continued in a low voice "Aren't you?"

The effect was electrifying. When the prosecutor roared "Charles Smith, you are lying!" the witness jumped in his seat like a pistol had been fired close to his ear and when this was followed by the question "Aren't you?"—being completely shocked off his balance—he told the truth and said, "Yes" in a low voice. The prosecutor then continued in a very mild tone.

Q. "Stanley Lemersall was with you and helped in that burglary?"

A. "Yes, sir."

Q. "And when you said he was not with you, you were trying to help him out?"

A. "Yes, sir."

It is needless to say, a speedy conviction followed.

This cross-examination was doubtless the most effective one that could have been used under the circumstances and was employed by a lawyer who seldom resorted to that method.

On another occasion, a similar attempt which was made resulted disastrously. In a suit involving the authenticity of a certain handwriting, a woman was on the witness stand. Counsel had been conducting an examination in a mild tone of voice, when suddenly, he leaped forward and shouted at the top of his voice, "Madam, you are lying, aren't you?" The woman jumped to her feet and yelled equally as loud, "Don't think you can scare me, sir. There is a difference between wind and brains." The laugh of the courtroom was on the lawyer.

It is a safe conclusion that where the so-called "brow-beating" style of cross-examination is the result of a naturally domineering disposition on the part of the lawyer, satisfactory results are rarely obtained, but that on occasions where the witness is stupid, or timid, or both, and is deliberately lying, this method may be used with telling effect. But this much the attorney must know in advance, that by using the "brow-beating" or "sledge-hammer" method he will either aid or injure his case—there will be no neutral results.

Long, tedious and aimless cross-examinations are to be, at all times, avoided. It is true in a majority of cases that such interrogations are unnecessarily prolonged. Frequently it occurs, however, that the cross-examiner must cling tenaciously to the object in view with an evasive witness. With such a witness, counsel must pursue his objectives to a successful conclusion regardless of time consumed.

Still another type of witness that requires the expenditure of both time and patience is the one who apparently can not answer the simplest question without a torrent of explanations which are not actually a response thereto, even though germane to the inquiry. It is a fatal mistake to allow this type of witness to divert one from his objective. Even though such a witness discloses a

new lead, it is better to make note of same, but not to depart from the original objective until its possibilities have been exhausted. There will then be time enough to return to the leads thus disregarded.

More cross-examinations with well-chosen objectives are rendered abortive by the pursuit of these "will o' the wisp" decoys than by any other single factor. In most cases the witness is not intentionally to blame for inducing the digression. He answers the question and innocently injects some promising suggestion which the cross-examiner pursues. Before this is exhausted, another interesting suggestion is revealed, which straightway engages counsel's attention and he is thus induced by this game of tag to run hither and thither without actually making any definite headway. The best rule is to pursue each objective to the end, before taking up another.

On the other hand, it is of great importance to compel the fair answers to the proper questions submitted. Invariably, when the witness is closely pressed and the questions are directed toward aspects of the case dangerous for him, he will side-step and evade. Sometimes he may apparently answer a question, yet avoid completely doing so.

Take a very simple illustration of what is meant.

Q. "Did you say John James was a thief?"

A. "I said I did not consider him an honest man."

It is obvious here, of course, that the witness has not answered the question and counsel should not be diverted from his objectives by asking the witness for his reasons why he does not consider John James an honest man. He can reprimand the witness and direct the attention of both the court and the jury to the fact that he has not answered the question by remarking "Witness, you have not answered the question. Reporter please read the

question." If these tactics are repeated as often as the witness resorts to evasion, he will soon be cured of this habit and counsel will be able to carry on a cross-examination with effect.

No greater mistake can be made by any lawyer than to attempt to make capital out of trifling discrepancies in testimony. The jurors know very well that human beings can not always be accurate regarding dates and figures and that each witness to a transaction will observe the thing from a slightly different angle and will honestly vary in his testimony relative thereto. Indeed, so universal is the application of this rule, that when witnesses detail conversations of some length in exactly the same language, or a number of witnesses agree to the exact minute as to when certain happenings occurred, or exactly agree on the details of a matter upon which the ordinary observer would be likely to disagree, jurors know their story is quite likely manufactured and agreed upon in advance. Therefore, when the cross-examiner pounces upon a witness because of an error in dates, or as to the number of people present on a particular occasion, or because the witness can not remember the exact conversation which occurred at a certain time or place, or because he on one occasion testified that he arrived home shortly after nine and on another occasion, he arrived home about nine-thirty, and similar trivial discrepancies, he is not only wasting his energy, but is actually aiding his adversaries. For example, in one case the plaintiff's evidence was very weak and had attorney for the defendant conducted a common sense cross-examination, a verdict would undoubtedly have been rendered in his favor. Instead of doing that, however, he launched into a tedious and prolix bantering and every omission or inexactitude which he could discover in the plaintiff's testimony was treated by him as of

tremendous importance. If the witness testified that she worked about three months for a certain firm, counsel immediately wanted to know exactly how many days she had worked and if she could not tell the exact number of days, he would turn to the jury with a sarcastic smile on his face, with "So, you do not even know how long you worked there, eh?" This sort of thing continued for two days. On the third, several of the jurors, when the counsel's back was turned, actually shook their fists at him and winked at the plaintiff's attorney. It is not difficult to guess the jury's verdict. "To whom have you talked about this case?" is a question which may be asked almost any type of witness without danger to the cross-examiner and with a fair chance at least that the former will give a negative answer which nearly always completely discredits him.

Not infrequently, the cross-examiner encounters the obstinate, biased witness who has taken sides so strongly that he will admit nothing and exhibits hostility at every question directed to him. In a case of this kind it is sometimes excellent tactics to induce the witness to believe that the counsel wants something directly opposite to that which he actually desires. For example, if the plan is to bring out something said at a given time, insistence with considerable force by the implication of questions, that nothing was said may result in a volley of truth from the adverse witness and possibly many important admissions. Again, if it is the plan to bring out that there was considerable number of people present on a given occasion, let the suggestion be made that no one was present but the witness, and the latter will quite likely exaggerate the number of people actually there.

Where the witness has testified to a conversation or to an event or an occurrence, under circumstances where such event, conversation or occurrence was one of a con-

siderable number of similar events, his testimony can always be minimized by testing his memory as to what he recalls as to said other events, conversations or occurrences. For example, a defendant was charged with the violation of a law which prohibited the driver of an automobile from turning out and breaking the line against oncoming traffic. He was arrested by an officer who testified that two or three blocks back the defendant had broken the traffic line and had passed three or four other cars in the face of traffic. Defendant took the stand and testified that he had not passed any cars. He was cross-examined as follows:

Q. "Down until the time the officer arrested you for turning out and passing cars, you had no reason to recall just how many cars you had passed, had you?"

A. "No, sir."

Q. "How many cars did you turn out and pass this morning in coming to this courtroom?"

A. "I don't remember."

Q. "You remember whether you passed any?"

A. "Yes, I passed some but I do not remember how many."

Q. "On the day you were arrested, how long had you been driving before the officer arrested you?"

A. "About an hour."

Q. "How many cars did you pass during that hour?"

A. "I don't know."

Q. "Did you pass any?"

A. "I don't recall."

Q "There is nothing in the passing of an automobile that really would tend to fix the matter upon your mind, is there, unless some accident occurs in connection with it?"

A. "No, sir."

Q. "And since you can not tell how many automo-

biles you passed, I presume you can not tell either when you passed such automobiles?''

A. ''No, sir.''

Q. ''Then, if you can not tell when you passed an automobile or how many automobiles you passed on this day in question, how can you be positive that you did not pass an automobile within three or four blocks of where the officer arrested you, as he claims he did?''

A. ''I don't think I did.''

The result was a conviction.

Frederic T. Harward, a brilliant practitioner of the Detroit Bar, who has had more than thirty years of experience in trial work, has set down the result of his experiences as a cross-examiner in part as follows:

''Every witness must be considered as a distinct problem. A line of questioning that might confuse one untruthful witness might have no effect on another although he was equally untruthful. One must scrutinize the direct examination carefully, while it is being delivered, for loopholes. Sometimes, in this way, a stray thread is found which unravels the whole story when judiciously handled. Merely taking a witness over his direct examination again is not cross-examination and is rarely productive of effective results; in fact, it often does positive harm because if the story is unshaken it only drives home with greater emphasis what the witness has testified to on direct examination. If the witness' story on direct examination convinces you he is telling the truth, you had better merely show the witness' opportunity for observation of the circumstances he is relating.

''In cross-examination it is well to stand up and get fairly near the witness. Your circulation is more sluggish when sitting. Cross-examination seldom avails much when the attorney stands at one end of the room and the witness at the other, and the questions and

answers are shouted back and forth; it is much like trying to cross-examine over the telephone.

Cross-examination when skilfully used is the best weapon the attorney has. When a case is ripped to pieces by a good cross-examiner—when witness after witness has fallen down before his barrage of questions —that case is lost. It can not be patched up again; the pieces can not be matched together. How are you to take this or that witness? When the witness walks from the back of the room to testify you must look him over, to see how and where you are going to tackle him. If he is falsifying, do not spare him. Often one who is testifying falsely has so little to say, his story is so short you can't catch him. It is well for the trial lawyer to prepare his cross-examination in advance. Where that can be done it will be found a very satisfactory method. A flippant witness should be drawn out and made more flippant, if possible; a little ridicule works well with such a witness. The jury have little use for a 'smart aleck.' An honest but mistaken witness should be shown every courtesy, but every effort should be put forth to show that he is in error and the reason, if possible, for his mistake ascertained. You will seldom get a witness to acknowledge error even if you prove it to him. A witness usually draws himself up and assumes a belligerent attitude when his cross-examination commences. It is well to proceed quietly, show him you are not going to treat him unfairly and having banished his hostility to you, you will find him much easier to handle. If he is hostile, he will tell nothing he may know which might help your case. If he is friendly he may drop something to your advantage. Personally, I have never seen much accomplished by the old fashioned heavy 'sledge-hammer' style. The one wielding it brings it down with such force, that he smashes everything in sight, oftentimes

his own toes, and if the witness does become confused, the jury will be apt to sympathize with the poor bully-ragged one, and lay his confusion to terror rather than anything else. If, however, while treating the witness courteously you get him 'in a hole' the jury will give little heed to his story and discredit him because his confusion under such circumstances can only be attributed to his lack of sincerity.

"The old fashioned savage method of cross-examining a witness should have passed out with the stage-coach and ox-team. Pedantry fares poorly in court. Let your English be as simple as you can make it—to convince a jury you must talk as they talk, think as they think, feel as they feel; otherwise you will have little effect on them. You must forget your college English and adopt the idioms and vernacular of the street. Your constant study must be man—human nature—man in his endless variety, not the man of books but the man of the street, the man of action, the kind of man you meet in the ordinary walks of life. You can't cross-examine; you can't try cases until you have lived with such men, shared their joys, felt their sorrows and when you have done this, you are fit to face the court or jury. I have known young men just out of college to ruin the best cases imaginable by their pedantic, supercilious ways before the jury. It does not take a juryman long to find out when a lawyer thinks he is better than they and as they have the last word, they are prompt and decisive in their punishment.

"Too frequent objections are bad. The jury get the idea that you are afraid of the facts; that you are trying to keep back something. I remember trying a case before the late Judge Robert E. Frazer, who was a great wit and endowed with an unusually keen mind. The case was tried without an objection. Upon its close he said, addressing my adversary and me 'You must be great

lawyers. You have tried this case without an objection.' I once won a case by tolling on the opposite lawyer to object. I knew his habit and that if he was angered he would doggedly object to every question, so I purposely aroused his ire and sure enough, he began objecting to every question, whether it was objectionable or not. And thereby he lost his case. I overheard one juror say to another 'all that fellow knows is to object.' Of course, the record should not be loaded with irrelevant and immaterial facts but often some part of the story which might be objectionable makes good food for cross-examination.

"Preparation is the ladder to success in trials. An early start should be made so that you are not hurried in your investigations. An English lawyer when asked 'How is it that one never sees you in a hurry?' replied, 'Because it is too expensive.' Don't wait until the eve of the trial before you begin to work on your case. The time to prepare is when the facts are fresh. The first man on the ground is apt to win the verdict. Cross-examine your own witnesses in your office before you put them on the stand. Assume the same position as your adversary will in court when he confronts them. Ask them the same questions you think he will and this you will find will take the terror out of the real cross-examination. When they find they are being asked the same questions you asked them, the ordeal loses half its terrors. A witness thoroughly cross-examined by his own counsel makes a far better witness for him when he is turned over for actual cross-examination by the adversary.

"When one rises to cross-examine or to make a plea he will be nervous indeed—that is if he is any good—his knees will weaken and his perspiration will flow copiously but this very fear or stage fright gives presence and

magnetism to the poor sufferer with it. If he controls it, this repressed emotion is transmitted to his hearers like the effect of a galvanic battery. It gives the idea of great reserved power. And don't think it is like 'buck fever'—you only experience it the first deer you shoot. This internal nervousness will return every trial, as long as you live. Choate was always wretched during a trial. He used to say he passed two sleepless nights—one in preparing what he was to say, one in lamenting what he had said. Cicero put it 'the lawyer is timid in himself, bold in his cause.'

"The cross-examiner must keep his temper; he must hide his feelings; his face must be a 'poker face' as inscrutable as that of the wooden Indian in front of the cigar store. Despair or dread must never be written there. When some of my fences have toppled over; when some of my witnesses have made woeful admissions on cross-examinations, I have often seen the jurors' eyes turn on me to see what effect it is having and if I can smile nonchalantly and 'keep my features' and look as if nothing had happened, the squall will often blow over without the jury's ascertaining the harm; whereas, if my tell-tale countenance had portrayed my internal fear, the case would have gone down then and there.

"If you get angry with a witness you are gone. You might as well sit down, for from that time on he is your master. I have often seen a cool headed witness unseat a hot headed lawyer.

"Fairness towards the witness is absolutely essential and should never for a moment be forgotten by the trial lawyer. The jury will always be a little antagonistic when you rise to cross-examine. They like to hear the story unfolded on direct examination. It is like an interesting novel which you read. You are just in the midst of the most exciting chapter when someone interrupts to

question you on something far afield. You don't like it. You show it in your answers, in your demeanor. So with the jury, they have heard the first chapter. They are anxiously awaiting the second. You have broken in on the story's continuity. They look askance at you. You are going to try to tear down—the world likes builders better than wreckers. You are a wrecker. You must gain their favor. You can do this only by courteous and fair dealing with the witness. If they come to the conclusion that you are only seeking the true facts and are quizzing the witness with that in view, they soon lose their hostility towards you and follow your efforts closely. I have seen lawyers lose their cases before the trial got fairly started by brow-beating the first witness on cross-examination and arousing the jury's animosity, and when an attorney has become persona non grata with the jury, he might as well put his papers in his brief case and go home.

"Wit and humor add zest to trials and relieve many of them of their dead monotony. Yet some judges utterly devoid of these characteristics themselves, quickly squelch any sign of them in others.

"Courtrooms are full of 'humanities.' There you see the human animal in his natural state with all the veneer of society removed, standing out stark naked in all his ugliness, for in this arena he is fighting for his own with all the characteristic fierceness of his prehistoric ancestor, the caveman. You see man just as he is, in fighting trim, his mask removed."

Henry M. Spaan of the Indianapolis Bar, who for thirty-five years was one of the outstanding trial lawyers of Indiana, delivered a lecture before the graduating class of the Benjamin Harrison Law School of that city which contained so many excellent and thoroughly practical suggestions on the subject of cross-examination

that a portion of his lecture is reproduced here as evidence of the veteran barrister's own impressions drawn from the school of practical experience.

"No one, no matter how able a cross-examiner he is generally, ought ever attempt a cross-examination unless he is thoroughly familiar both with the law and the facts of the case on trial. This, I consider to be the basic rule for cross-examination which ought never to be deviated from.

"A brilliant cross-examiner can easily ruin a case if he does not understand it. He may bring out facts inconsistent with the theory of the complaint if he appears for the plaintiff, or he may ruin a defense by proving a fact the other side knew nothing about. Never ask a question, the answer to which will not help your theory, either of prosecution or defense as the case may be. No matter how great the temptation is to branch off into a side issue, turn your back upon it. If a witness does not testify to anything that will hurt your theory, dismiss him without a question. He may, if questioned, hit you a chance blow that will ruin you, or you may open the door to evidence that would otherwise be incompetent. Besides it is evidence of being a clear cut lawyer if you refuse to cross-examine needlessly. Again, I have known the other side to purposely put up a dummy, hoping that the cross-examination might lend them aid. I have seen lawyers spend half an hour cross-examining a witness who had testified to practically nothing but his name and where he lived. I have seen jurors so tired of such conduct that they were ready to mob the offending lawyer, while the poor client, not knowing any better, was helping the game along by suggesting more questions.

"Never ask a question on cross-examination merely because it has been suggested to you by your client. Give your client to understand from the beginning that you,

and not he, is managing the case. He will respect you more, but if he is a fool and gets angry, all the more must you refuse to be governed by his wishes.

"When you are through cross-examining, excuse the witness at once. Don't give the impression to the jury that you do not understand your business by calling the witness back a time or two. If you understand your business, you won't have to call him back. Even if you have forgotten something, unless it is very important indeed, do not call him back. It looks weak.

"Never ask a witness a question on cross-examination hoping that he may testify to something that may help you. That is not practicing law, that is gambling pure and simple. Once in a long while the chance may come your way but a wise lawyer never takes the chance. Of course, if you have a desperate case, you may be justified in such conduct but even then if the answer is against your client he would be justified in suing you for malpractice.

"In cross-examining, remember this, that no case is ever tried upon the facts as they actually occurred; it is tried upon the facts as they are made to appear, through the medium of human testimony. Very few men observe closely. No two men see things alike. Very few see or hear perfectly. Very few have any reliable sense of time, place or distance. Some men are deeply biased on account of religion or politics. Some are so egotistic that they measure everything by their foot rule. Very few men think clearly or reason logically. Very few have analytic minds. It is to get the truth as near as possible out of this human jumble that is the task of the cross-examiner.

"If an honest witness tells his story but it is so rambling, so illogical, so buried in insignificant details, that

the jury can not make it out, don't cross-examine such a witness. Every question you ask him may awaken his memory to some forgotten fact. I have seen lawyers cross-examine such a witness until his story stood out bold and strong, and the cross-examiner when he realized what he had done, must have felt that his cross-examination was worse than a failure. Again, if the witness is an honest one and tells a clear straightforward story, do not cross-examine him upon the main story, he will only emphasize it. Cross-examine him for lack of memory, for distances, for marks of identity, for bias, for religion, for politics, for anything but his story. If you go at him in a quiet confidential way, he may admit something that will weaken his story very much. You may get him to place himself in a position where it would be hard for him to have seen what he said he saw. If it is a case of identity, get him to describe very minutely the man he identifies, his clothing, his manner of walk, of expression, then when the next witness comes on, cross-examine him the same way and the chances are there will be quite a difference in the details of the identification.

"In other words, when you are cross-examining a clear-headed honest witness, never give him a chance to repeat his story, but pull the attention of the jury away from it by compelling the witness to go into details that he was not compelled to go into in his testimony in chief. No two witnesses can be cross-examined alike. It is imperatively necessary that the cross-examiner have a thorough knowledge of human nature. He must be able to distinguish almost at a glance the difference between the honest but stupid witness and the also honest but 'know it all' witness. If the stupid witness is helped along gently but firmly, he will often prove a very valuable ally; but the mistake must never be made to be severe with such a witness. By doing so, you get the 'jury down on you,'

and you increase the stupidity of the man who might help you if you would let him or show him how.

"But the 'know it all' witness must be taught early in the game that your questions must be answered and nothing else. Be firm with him and if necessary, a little sharp, the great point being to give him to understand you are the master of the situation. A slow, deliberate method is very effective, unless you find that the witness does not think clearly; in that event, it is well to crowd him but not unseemly. The cross-examiner must at all times remember that the jury will always side with the witness if it concludes that the lawyer is trying to befuddle him.

"The popular notion of a cross-examiner is obtained from the newspapers. He is usually depicted as a big man with a big voice and an eagle glance; he is described as 'grilling' the witness 'tearing the mask from his face' and all that kind of cheap clap trap. The truth of the matter is that a cross-examiner should be a gentleman in his deportment and a kind, considerate man with witnesses. He must be alert, keen of intellect, and with a tenacious, ready memory. The brow-beater never attained any lasting success. If lawyers only knew how juries look upon the abuse of a witness, they would be more careful. Most witnesses try to tell the truth as they see it, and the jury usually gives them credit for that. If a cross-examiner confuses an honest witness, he had better set him right at once, or the jury will get even with him. Jurors know that the contest between a lawyer and a witness is an unfair one at best. No matter how bright the witness may be, he is in an atmosphere which is strange to him and the mere fact that he has to sit up in a witness chair facing a strange lot of men will often confuse him. The jury knows this and unconsciously side with the witness. I have seen many cases ruined by an injudicious cross-examiner, who thought it was smart to

confuse a witness and then poke fun at him or become sarcastic at his expense. Judges allow too much of such conduct on the part of counsel, but as it usually hurts the lawyer, who indulges in it, matters are evened up in the verdict.

"When a trial degenerates into a mere contest between lawyers as to which side can create the most confusion in the minds of the jury, the verdict is apt to be anything but satisfactory.

"No good cross-examiner ever attempts to merely confuse a witness. That lawyer gets a verdict who makes things clear to a jury. As a rule juries are anxious to arrive at the facts and if the jury is bewildered their verdict will be bewildering.

"A cross-examiner who understands his business is very rarely beaten by a lying witness. It is the hardest thing in the world to establish a lie. When the cross-examiner is thoroughly familiar with all of the facts and the law of his case, a liar's story does not fit in. It must always be remembered that every fact is the direct result of some preceding fact, and the lawyer who knows as he ought to, the exact history of the facts in his case can not be imposed upon by a lie no matter how deftly constructed.

"The most dangerous witness is one who tells part of the truth only, and twists the rest. In trying a case it is the duty of counsel to get clearly and strongly before the jury the theory of his case; when this is done a lying witness can do but little harm. It is best sometimes not to cross-examine a lying witness at all, but rely upon the strength of your case to defeat his story. There is always the danger of giving a lying witness' story too much prominence by over-cross-examination. If the witness does not testify upon a vital point in the case, it is best to treat him with indifference. It is always a weakness to

pay much attention to side issues. Most cases turn upon one or two main points; always keep them clearly and prominently before the jury. Always cross-examine up to the main points; the minor points will take care of themselves. If a good point has been made upon a cross-examination drop the witness; do not fritter away what you have gained by a lot of useless questions.

"If a point has been clearly made upon cross-examination, do not weaken it by repetition. Some lawyers never know when to let go; it is a priceless knowledge. Go directly to the point. A mass of details only burden the memories of the jurors. Remember that jurors as a rule have not trained minds, and they will only understand and remember that which is made clear. Brevity is not only the soul of wit, it is also the first requirement for clearness. Long, turgid cross-examinations muddy the waters of reason and weary the soul. I have seen many wornout anxious jurors who were hopelessly floundering in the lawyers' mixed up case.

"Suppose a witness for the other side has told the story as to what he saw, it is folly to take him over the story again in detail. Find out by a few questions just where he was and what he was doing when the facts he testified to were happening. If he places himself where he could not see, let him go. You have made his story worthless. Do not be so carried away with your triumph as to show it to the jury. It is time enough to drive the point home when you come to argument.

"If by cross-examination, a witness has been placed in a wrong position, never be so foolish as to ask him to explain his predicament. He may do so. He may say 'I did not mean that,' then you have lost your point, because opposing counsel will ask him to explain further if you do not. Leave explanations for argument, never to the witness. Suppose a date becomes a material point in a

case, as it often does, and on cross-examination the witness has given the wrong date, do not ask him another question on the point, for if you do, he will either say he was mistaken or that he had forgotten.

"A good cross-examiner very often does not know himself how to cross-examine a given witness. It is hard to get the mental caliber of some witnesses, and still harder to get their viewpoint, and it is absolutely necessary to get both, for, if you do not, questions are dangerous. The mental caliber of most witnesses is evident at a glance to a master of the art, but very often under a cloak of seeming ignorance is hidden a shrewd and capable mind. This can easily be determined by a careful cross-examiner by a few general questions. But the all important thing to do is to get the viewpoint of the witness; find out what his politics are, his religious views, his moral bent, how and where he was educated, whether rich or poor; get his outlook on life, whether narrow and bigoted or progressive and liberal. Most of these matters can be learned before the witness takes the stand, but in any event, the cross-examiner should know them. A man is largely known by his companions and it is an easy matter to bring out who they are in any given case.

"A cross-examiner must be able to sound all the depths and shoals of human morals and human motives, perceptions and intelligence. He must be able to take the viewpoint of the lowly and the ignorant as well as that of the rich, the powerful and the intelligent.

"He must have a thorough knowledge of current affairs, the religious, the political and the business thought of the community. He must be conversant with newspaper news and criticism, with the language and thought of the men on the street, in the factory and on the farm. He must know the modes of thought of the men he is likely to come in contact with, whether it be a minister of

the gospel or the head of a gambling joint. He must know how the barkeeper judges life as well as how the banker and the business man look at it. He may have to cross-examine a prize fighter, or a lady whose chief acquirement is her knowledge of social rules. He must know how to get at the heart of a railway brakeman as well as at the narrow viewpoint of the girl behind the counter. In short, all of human endeavor, of human experience, from the highest to the lowest, are subjects for study to the cross-examiner.

"To be a successful cross-examiner requires a broader knowledge of men and affairs of life than any other profession. His information on all subjects must be without limit. His eyes and ears must be open to all the contending forces of life, and his judgment must be ripened with the experience and knowledge of all the ages.

"The cross-examiner must read and devour everything from the daily news to the solemn sentences of biblical wisdom. He must delve into and study business life, physical science, history, travel, general literature, all the arts and sciences, mechanics, bookkeeping, banking, accounting, sociology; in short, human industry in every form. Remember that sparks of all the sciences in the world are taken up in the ashes of law.

"There is no arena of human endeavor that the cross-examiner may not touch upon in the course of his career. A lawyer without a knowledge of literature and science is a mere mechanic and he can never rise to the higher levels of the profession. To be great as a cross-examiner one must have lived in sympathy with all the kings and queens of literature, and his daily draught from the fountain of knowledge must fill him to repletion.

"Nothing is lost or out of place to the cross-examiner. He may one day delve into the inanities and turgid moralities of the society novel and the next he may be soar-

ing with LaPlace and Herschel amidst the spheric wonders of the universe.

"There is no man so humble that he can not teach the cross-examiner something. There is no man so great that his deeds may not be the subject of the cross-examiner's art. To the cross-examiner, the whole world is a ripened melon waiting for his trenchant knife.

"The cross-examiner must develop to its utmost, that which, for the want of a better name, is called the sixth sense; that is, the instinctive sense of what to do on the instant, without stopping to reason it out. This faculty comes from long and laborious practice. It is the result of a highly trained mind. It comes only to the master of the art after years of toil.

"The cross-examiner must always work up to a fitting climax; that cross-examination is a failure that trails off into insignificant trivialities at the close. Stop when there is a good taste in the mouth and you are master of the situation. Anti-climaxes in cross-examination are as fatal as in rhetoric.

"The cross-examiner must have the faculty of concentration, must have the ability of carrying out a line of thought rigidly to its minutest finality if necessary. Sidestepping is dangerous. If you have a witness on the run, keep after him so long as he is running but stop the instant he is down. It is always dangerous to excite sympathy by too much pounding. Even a perjurer may become an object of pity, and when you allow him to, you have gone too far.

"The cross-examiner needs undaunted courage, he must spare neither friend or foe. Nor must he consider the enemies he is making. A lawyer who thinks more of his future practice than of the case in hand will never become a good cross-examiner. Men will soon say of that kind of a lawyer 'He hasn't got the guts.'

"The cross-examiner must have unlimited energy. An unstrung and tired out mind can not master other minds. The cross-examiner must not only be able to throw down the gage of battle to all comers but he must have the energy to carry on till the bitter end, no matter what that end may be, victory or glorious defeat.

"The cross-examiner must have a strong memory for the minutest details; and his memory must be a correct one. Nothing is so futile as the cross-examination on a point that the cross-examiner has but a hazy notion of. He, of all persons must know what he is talking about. He must absolutely dominate the situation. It must be remembered that very often it is the small details that determine cases. A badly remembered detail is as dangerous sometimes as a U-boat torpedo.

"The cross-examiner must have a reputation for integrity. The court and jury must believe in his honesty of purpose, for if they do not, mere brilliance of cross-examination will not avail. Jurors have a keen sense of truth and it is truth they are after. A lawyer who purposely misquotes or misleads a witness soon loses his standing before the jury. The character of the cross-examiner counts for much. A reputation for honesty is an open sesame to the hearts of the jury and the court. In the decisive moments of the trial, the jury will lean instinctively towards the lawyer who is trying his best to show them the truth. Very often a lawyer's sole reliance is the conscience of the jury, and that conscience can be captured only by him who speaks and acts the truth. The cross-examiner's intuitions must be true. A crooked mind may be brilliant but it is rarely convincing.

"The cross-examiner must have the capacity for taking infinite pains. No lawyer has the right to attempt a cross-examination unless he understands the case in hand fully. Cross-examination is like a game of chess; you can

not hope to win it unless you understand the full value of every move. A lawyer ignorant of the facts in the case may blunder along and make no mistake in the cross-examination but the chances are that before he gets through, he will make the judicious grieve, and it is altogether certain that if he escapes danger, it will be either a miracle, or equal incompetence on the other side.

"In cross-examining ignorant people, use very plain language. Never be guilty of saying 'prior' when you mean 'before.' Talk in good short Saxon words and sentences, rather than in Latin derivatives and declamatory sentences. Say 'Jesus wept' instead of 'The Saviour of the world shed tears'; say the 'mother loves her child' instead of the 'female parent has a great affection for her offspring.'

"The cross-examiner must have a full and comprehensive vocabulary of common expressions. Even a little slang is much better than an affectation of polysyllabic words. Study carefully how common people express themselves and do likewise. Directness, clearness, terseness must be aimed at.

"Most of the persons whom the cross-examiner will have to question are common laborers, barkeepers, prize fighters, gamblers, carpenters, machinists and farmers. He must learn how to think along their level. He must make them feel that he does not consider himself above them. He must be able to enter into their lives.

"If a cross-examiner is called upon to question an expert he must understand the matter in hand as fully as the expert. A mere smattering is more dangerous than no knowledge at all. The cross-examiner must be a man capable of great and continued hard mental labor. He must be able to burn the midnight oil night after night till he masters his subject. If he does not do this, his subject will master him. When the cross-examiner is ques-

tioning an insanity expert he must be able to handle and understand the technical terms applied to the anatomical construction of, and the faculties of the brain and nerves. When he questions a geologist, he must know the construction of the earth and how its layers of stone were built up age by age through millions of years; he must be able to follow the motions of the earth and sun and the sweep of the stars through the abysses of space when he undertakes to examine the astronomer. He must be a carpenter with the carpenters, a brick layer with the brick layers, and an architect with the designers of the stately column and the soaring dome.

"To a good cross-examiner no fact comes amiss, no knowledge is unimportant. No lawyer can become a great cross-examiner unless he has boundless enthusiasm. Nothing great is ever accomplished without enthusiasm. A mere money-making lawyer never becomes a great trial lawyer. One must feel the burning necessity for success, and be willing to put in long sleepless hours of hard labor in order to become a good cross-examiner. There is no primrose path to success—it is lying along thorny and rocky ways where a high heart and indomitable will must be the only guides.

"Remember that a well-conducted trial is in the highest sense a search after truth, whether the trial is before court or jury. Cross-examination is a child of darkness if it is used to confuse the ignorant and trap the unwary. A splendid cross-examiner must be like a plumed knight, sworn to uphold the right and to condemn the wrong. A case won by a mere trick of cross-examining is worse than a case lost to the lawyer who stooped to the trick. Juries as a rule can see through trickery and while they may admire the smart lawyer who takes advantage of a defenseless witness, their verdict goes to the side that is honest. Juries come fresh from the common things of

life and are full of the red blood of justice. Trickery is abhorrent to them.

"He is the greatest cross-examiner who makes the fewest blunders; therefore, very often, the least cross-examination is the best. Never cross-examine merely because there is opportunity. Very often 'fools rush in where angels fear to tread' and the result is dire disaster for which there is no remedy under heaven. Many a poor client has eaten his heart out in deepest grief as the result of a 'fool cross-examination.' There is no more dangerous weapon placed in the hands of incompetency than the chance to cross-examine. It slays a friend more surely than it injures the enemy. The remedy that will prevent disaster is never ending work, self discipline and thorough preparation. There is genius in art, poetry, music and literature, but genius in the law is no more than a capacity for untiring work, life-long perseverance and ceaseless industry. If you have a case in hand, study it profoundly. Day and night let it be before you. Explore it in all of its bearings. Interrogate the facts until they give back the right answer to your mind. Let the case pervade you, obsess you, and the result will be when you try it, that men will say 'that lawyer is a genius.' No, you are not a genius, you have the indomitable unending capacity for labor governed by a logical mind. Success awaits only him who labors intelligently.

"Toil! Labor! Work! and again Labor! Toil! Work! is the golden rule that must be learned early and followed all the days of life. You can not float to success on 'flowery beds of ease.' Very few men have ever won success in the law by genius or by luck. The consideration of the contract is preparation, in this age of struggle. Carlyle says: 'The race of life has become intense; the runners are treading upon each other's heels. Woe be to him who stops to tie his shoe strings.'

"Human nature must be the constant study of the cross-examiner,—man in his endless variety, from the coal heaver with slanted brow and narrow ideas, to the learned savant who soars like an archangel amidst the world's knowledge. Men of action must be studied, men of red blood, in all their kaleidoscopic variety. God has never yet made two men alike, but there are certain underlying motives of action that touch the spirit of all and these must be learned. The only way to know men is to live with them, sharing their joys and sorrows. You must know men as they live in the pleasant homes of plenty, as well as amidst the squalor and penury of the poor.

"Last, but not least of the necessary accomplishments of the cross-examiner that I will mention, is the voice and expression. Learn to speak the English language correctly and plainly. There are thousands of lawyers who are practicing their profession who can not read an authority out of a law book to a court without stumbling and mumbling over their words as if their mouths were full of hot mush. Such a lawyer can not cross-examine because he can not speak properly. Spend an hour each day in reading aloud the best authors. Pronounce each word clearly and deliberately. Learn to control the voice. By all means, take some lessons from a good elocutionist. Learn how to breathe properly. A good speaker must be carefully trained as well as a good singer. Remember that it takes days and weeks to try some cases. A monotonous voice, a careless manner of expression will wear out both court and jury. Learn how to talk naturally. Don't scream or bellow; a calm deliberate tone will go much further. It is not necessary to rant in order to express passion; it is better expressed by low clear full tones, that can be heard plainly in the largest room. Do not allow yourself to fall into a dull unvarying mono-

tone that will wear out nerves of steel. Imagine yourself day after day before the same jury, never altering the pitch of your voice. By that time would you blame the jury much if they felt like hanging both your client and yourself?

"Last of all, have the rules of evidence at your fingers' end. There is not time to look at books in the rush of the trial. Always state the rule accurately and in as few words as possible.

"I have thus briefly sketched for you, the requirements of a good trial lawyer and cross-examiner. To become one is a life study. But the game is worth all the pains that can be taken. When you find a successful trial lawyer, you see a man who has dug deep his foundations of knowledge. Stone by stone, has he builded the temple of his accomplishments, and upon its glittering top, falls the eternal sunshine of satisfied endeavor."

Leaving the suggestions of these great advocates, the more important rules of cross-examination may be summarized as follows:

1. Do not cross-examine a witness unless you have a definite objective in mind. The asking of rambling questions in the hope that something will turn up should never be practiced.
2. Give some thought, in advance of the trial, as to how the witnesses of the adverse party are to be interrogated and, wherever possible, prepare the cross-examination in advance.
3. During the cross-examination, watch the witness closely and require that he answer your questions without evasion. You will never achieve any measure of success in cross-examination unless you do this.
4. Never be diverted from the objective of your cross-examination by some promising lead that

may be injected in the case by the witness. Exhaust one objective before taking up another.

5. Never attempt to make much of trifling discrepancies in the testimony either by your cross-examination or by your argument to the jury. The latter know that human memory is not exact as to time, dates and amounts.
6. Use language just as simple as possible in cross-examining witnesses.
7. Invariably be courteous and fair towards the witness even though you are demolishing his testimony by cross-examination. If you show the jury that the witness is a liar by your cross-examination, let it go at that but do not call him one.
8. Stand up close to the witness in cross-examining. Standing back at a distance and shouting at the witness is never productive of favorable results.
9. Avoid the "sledge-hammer" or "brow-beating" method of cross-examination. This sort of thing can only be used on the witness who is obviously lying or is stupid or timid, or both. Use of the "brow-beating" method by the lawyer who is naturally of a domineering disposition, is fatal.
10. Never try to show off your smartness in cross-examination. The courtroom, before a jury, is no place for the "smart-aleck" lawyer. The lawyer who believes he is smart and discloses his egotism is almost certain to gain the ill-will of the jury.
11. "To whom have you talked about this case?" This question or one of similar import can be put to almost any witness without any disadvantageous results. If the witness answers in the negative, almost invariably he is lying and the cross-examiner may then discredit his entire testimony.

He gets sympathetic with the first lawyer; i.e., the one who calls him.

12. Never use sarcasm or ridicule against a witness because of his poverty, lack of education, personal appearance or his stupidity. The jury is quick to resent such an attitude on the part of the cross-examiner.
13. If you are representing the defendant, bring out the humorous aspects of the case whenever opportunity affords; such a course tends to lessen the gravity of plaintiff's case.
14. Always keep a "poker face." If a witness makes a break which goes badly against you, smile it off. Do not show it when badly hit.
15. Never allow yourself to be influenced by what your client desires you to ask a witness. You and not he, have the responsibility of the litigation.

CHAPTER 3

PSYCHOLOGICAL VALUES

In ninety-nine cases out of a hundred the lawyer who is to cross-examine a witness has no possible means of knowing whether or not his client's version of the case conforms to the actual facts. Before going into a trial, he will take a comprehensive statement of what his client claims to be the facts and he will then secure from witnesses, whose names are usually furnished to him by his client, corroboration of his client's claims and then so far as the lawyer is concerned, such statements become the actual facts and all cross-examinations are grounded upon them. He will then nearly always hear the testimony of his client and that produced in his behalf, sharply disputed in its essentials by other witnesses. What the actual truth in the case really is, then, can not be known, but the experienced trial lawyer realizes that human testimony from the witness stand is much more unreliable than is generally supposed.

The experimental psychologist in his endeavors to arrive at a true evaluation of human memory, to weigh and determine the accuracy of human impressions, and to trace the association of ideas and thought processes, has rendered to the bench and bar an important service in showing how unreliable human impressions and the human memory really are. It is the experimental psychologist who is now able to tell us just how much or how little actual dependence may be placed upon human observance by reasons of those tests which he has made wherein no self-interest prompts falsification. The late Professor Hugo Munsterberg, formerly of Harvard University, as

long ago as 1908, gave the following illustrations from his book, On the Witness Stand:[1]

"Last winter, I made quite by the way, a little experiment with the students of my regular psychology course in Harvard. Several hundred young men, mostly between twenty and twenty-three took part. It was a test of a very trivial sort. I asked them simply, without any theoretical introduction, at the beginning of an ordinary lecture, to write down careful answers to a number of questions referring to that which they would see or hear. I urged them to do it as conscientiously and carefully as possible and the hundreds of answers which I received showed clearly that every one had done his best. I shall confine my report to the first hundred papers taken up at random. At first, I showed them a large sheet of white cardboard on which fifty little black squares were pasted in irregular order. I exposed it for five seconds and asked them how many black spots were on the sheet. The answers varied between twenty-five and two hundred. The answer, over one hundred, was more frequent than that of below fifty. Only three felt unable to give a definite reply. Then I showed a cardboard which contained only twenty such spots. This time the replies ran up to seventy and down to ten. We had here highly trained, careful observers, whose attention was concentrated on the material, and who had full time for quiet scrutiny. Yet in both cases, there were some who believed that they saw seven or eight times more points than some others saw; and yet, we should be disinclined to believe in the sincerity of two witnesses of whom one felt sure that he saw two hundred persons in a hall in which the other found only twenty-five.

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[1] On the Witness Stand, by Hugo Munsterberg, copyright 1923 by Doubleday, Page and Company, and reprinted by permission of Doubleday, Doran and Company, Inc., publishers.

"My next question referred to the perception of time. I asked the students to give the number of seconds which passed between two loud clicks. I separated the two clicks at first by ten seconds, and in a further experiment by three seconds. When the distance was ten, the answers varied between half a second and sixty seconds, a good number judging forty-five seconds as the right time. The one who called it half a second was a Chinese, while all those whose judgments ranged from one second to sixty seconds were average Americans. When the objective time was three seconds, the answers varied between half a second and fifteen seconds. I emphasize that these large fluctuations showed themselves in spite of the fact that the students knew beforehand that they were to estimate the time interval. The variations would probably have been greater if the question had been put to them after hearing the sound without previous information; and yet a district attorney hopes for a reliable reply when he inquires of a witness, perhaps of a cabman, how much time passed by between a cry and the shooting in the cab.

"In my third experiment I wanted to find out how rapidity is estimated. I had on the platform, a large clock with a white dial over which one black pointer moved once around in five seconds. The end of the black pointer, which had the form of an arrow, moved over the edge of the dial with a velocity of ten centimeters in one second; that is, in one second the arrow moved through a space of about a finger's length. Now, I made this clock go for a whole minute and asked the observers to watch carefully the rapidity of the arrow, and to describe, either in figures or by comparisons with moving objects, the speed with which that arrow moved along. Most men preferred comparisons with other objects. The list being as follows: man walking slowly; accommodation train; bicycle

rider; funeral cortege in a city street; trotting dog; faster than trot of man; electric car; express train; goldfish in water; fastest automobile speed; very slowly, like a snail; lively spider, and so on. Would it seem possible that university students trained in observation, would watch a movement constantly through a whole minute and yet disagree whether it moved as slowly as a snail, or as rapidly as an express train. And yet it is evident that the form of the experiment excluded every possible mistake of memory and excluded every suggestive influence. The observation was made deliberately and without haste.

"Those who judged in figures showed not less variation. The list begins: one revolution in two seconds; three inches a second; twelve feet a second; thirty seconds to the hundred yards; seven miles an hour; fifteen miles an hour; forty miles an hour, and so on. In reality the arrow would have moved in an hour about a third of a mile. Not a few of the judgments therefore, multiplied the speed by more than one hundred.

"In my next test, I asked the class to describe the sound they would hear and to say from what source it came. The sound which I produced was the tone of a large tuning fork, which I struck with a little hammer below the desk, invisible to the students. Among the hundred students whose papers I examined for this record were exactly two who recognized it as a tuning fork tone. All the other judgments took it for a bell, or an organ pipe, or a muffled gong, or a brazen instrument, or an hour, or a 'cello string, or a violin and so on. Or they compared it with different noises as the growl of a lion, a steam whistle, a foghorn and fly-wheel, a human song, and what not. The description on the other hand, called it soft, mellow, humming, deep, dull, solemn, resonant, penetrating, full, rumbling, clear, low; but then again,

rough, sharp, whistling and so on. Again I insist that every one knew before hand that he was to observe the tone, which I announced by a signal. How much more would the judgments have differed if the tone had come in unexpectedly?—a tone which even now appeared so soft to some and so rough to others—like a bell to one and like a whistle to his neighbor. * * *

"Now, let us keep this in mind in looking over the last experiment, which I want to report. I stood on the platform behind a low desk and begged the men to watch and to describe everything which I was going to do from one given signal to another. As soon as the signal was given, I lifted with my right hand, a little revolving wheel with a color disk and made it run and change its color, and all the time, while I kept the little instrument at the height of my head, I turned my eyes eagerly toward it. While this was going on up to the closing signal, I took with my left hand, at first, a pencil from my vest pocket and wrote something at the desk; then I took my watch out and laid it on the table; then I took a silver cigarette box from my pocket, opened it, took a cigarette out of it, closed it with a loud click and returned it to my pocket and then came the ending signal. The results showed that eighteen of the hundred had not noticed anything of all that I was doing with my left hand. Pencil and watch and cigarettes had simply not existed for them. The mere fact that I myself seemed to give all my attention to the color wheel had evidently inhibited in them the impression of the other side. Yet I had made my movements of the left arm so ostentatiously and I had beforehand so earnestly insisted that they ought to watch every single movement, that I hardly expected to make any one overlook the larger part of my actions. It showed that the medium, famous for her slate tricks, was right when she asserted that as soon as she succeeded in turning the

attention of her client to the slate in her hand, he would not notice if an elephant should pass behind her through the room.

"But the chief interest belongs to the surprising fact that of these eighteen men, fourteen were the same who, in the foregoing judgment, judged the light grey to be darker than the dark blue. That coincidence was, of course, not chance. In the case of the darkness experiment, the mere idea of greyness gave to their suggestible minds the belief that the colorless grey must be darker than any color. They evidently did not judge at all from the optical impression, but entirely from their conception of grey as darkness. The coincidence, therefore, proved clearly how very quickly a little experiment such as this with a piece of blue and grey paper, which can be performed in a few seconds, can pick out for us those minds which are probably unfit to report, whether an action has been performed in their presence or not. Whatever they expect to see they do see, and if the attention is turned in one direction, they are blind and deaf and idiotic in the other.

"Enough of my class-room experiments. Might they not indeed work as a warning against the blind confidence in the observations of the average normal man, and might they not reinforce the demand for a more careful study of the individual differences between those on the witness stand?"

But, after all, attorneys need not go to the psychologist to be convinced of the unreliability of human impressions and memory. Every day in the courtrooms all over the land, are found witnesses whose integrity is above reproach, contradicting each other radically where the subject of their testimony involves their powers of observation. The conclusions of Professor Munsterberg

may also be confirmed by referring to personal experiences.

Reflection upon the past easily recalls instances where the strongest possible impressions of a certain fact or of a certain place or of the appearance and location of a certain building have been discovered to be entirely erroneous. A striking illustration of this tendency to entertain a wholly false impression over a period of years is the actual case of a man who owns a piece of property near a small village named X. He spent some time at this village about ten years ago but had not visited the place again until during the past summer. During the preceding six or seven years, he had, on different occasions, described this village to various friends in connection with the property owned by him in that vicinity. In such discussions, he invariably pictured it as a town of four or five hundred population with a dozen or more business houses, with a bank and with paved streets. So thoroughly was he convinced of the truth of his impressions that he would have been willing at any time to have taken the witness stand and supported them under oath. An actual visit to the place, however, during the summer of 1928, revealed the fact that it consisted of three frame general stores, a gasoline station and eight residences!

Other important psychological and physiological characteristics of witnesses with which the cross-examiner should thoroughly familiarize himself are:[1]

1. That witnesses are almost invariably biased, or, in other words have already taken sides in the case, even though they have no financial interest directly or indirectly in its outcome.
2. That, other things being equal, where a party to

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[1] See Guy Montrose Whipple, The Obtaining of Information; Psychology of Observation and Report, in the Psychological Bulletin, July, 1918; Brown's Legal Psychology, page 99 et seq.

the litigation has interviewed a witness first and has presented his side of the controversy, such party by a biased and one-sided presentation of the facts will almost invariably secure the sympathy of the prospective witness which will remain throughout the case and is bound to tinge and color his testimony.

3. That where a witness is biased in a case, his conclusions and inferences from a given state of facts are quite likely to be erroneous; notwithstanding the fact that he may be honest in the ordinary sense of the term.
4. That the first condition for securing accurate information is the possession of reasonably efficient sense organs of sight, hearing and smell; and that many individuals are defective with respect to clearness of vision, efficient auditory organs and in the sense of smell.
5. That men whose vision is perfectly normal differ exceedingly from one another in the clearness thereof.
6. That men who are equally good at seeing in the day time may be deficient in observing at night.
7. That to secure the best results on the part of those who see better at night, it is necessary that the retina of the observer should have a certain amount of time to get used to the dim illumination.
8. That a night or twilight eye sees no colors and observes better out of the corner of the eye than straight ahead.
9. That in using the sense organs, certain illusions appear and such illusions are common to all persons; if they are not definitely understood, they

may lead to false interpretations of what has been seen.

10. That under some conditions, an observer may believe he has perceived an illusion when, in reality, he is the victim of an hallucination and this may affect any man and is especially liable to occur under abnormal nervous conditions, like extreme fatigue, druggery or emotional excitement.
11. That observation is peculiarly influenced by expectation.
12. That the degree of attention that can be given is not constant but varies from moment to moment.
13. That whenever any interval of time elapses between the actual carrying out of observation and the recording of it by word of gesture or pen, the accuracy and completeness of the record tends to be reduced by errors of memory.
14. That the most common inadequacies of memory are errors of omission.
15. That the recollection of what has been observed is liable to falsification by erroneous insertion.
16. That such recollection is liable to falsification by substitution.
17. That such recollection is liable to falsification by transposition in the time order and space arrangement of items.
18. The omissions, insertions, substitutions and transpositions that affect the accuracy of memory are often quite unnoticed by the observer.
19. The correct recollection of one feature of an object or event does not guarantee the correct recollection of other features of the same object or event, even though these features seem logically bound up in one another.

20. When a number of persons report upon the same matter, those details upon which agreement appears may in general be considered as correct.
21. But if a number of persons agree perfectly in their statements about numerous small details under such circumstances that observation must have been difficult and memory of them must have been likely to unintentional error, then suspicion is justified and collusion probable.
22. When the truth is to be ascertained by the examination of several witnesses, of the same event, these witnesses should be examined separately and, if possible, before they have been able to exchange ideas about it.
23. Items recalled by interrogation, though unmentioned in narrative, may often be reported as accurately as other items that were mentioned in the narrative.
24. The amount of error in the testimony depends much on the skill with which the questions are framed; it is considerably increased if the interrogation contains suggestive questions.
25. If by an error is meant any distinct discrepancy between items reported and the actual facts, it may be laid down as a rule that even in the case of competent adults, observing and reporting under favorable conditions, errorless report is the exception. On the contrary, if the report attempts to get down to details, the average reporter will make a score of about seventy-five per cent in accuracy, not counting omissions and errors.
26. Estimates of distances, heights, angles, numbers and dimensions of objects are open to considerable inaccuracy and are often subject to constant tendencies to over or underestimation.

CHAPTER 4

TO WHOM HAVE YOU TALKED ABOUT THIS CASE?

"To whom have you talked about this case?" Astonishing as it may seem, this question has discredited more individuals on the witness stand than any other. Especially is it effective where the witness is not of a high order of intelligence or experienced in court. Where the evidence has been fabricated as a result of suggestions from or under an agreement with the adverse party, witnesses unless posted in advance will almost invariably make a strong denial of the suggestion that they have talked to or discussed the case with anybody.

When the witness answers this question in the negative, the following cross-examination from a case recently tried is illustrative of what may be done:

Q. "You talked this matter all over with K., the adverse party, and he told you what to say, didn't he?"

A. "Absolutely not."

Q. "But you did talk it over with K. did you not, before you took this witness stand?"

A. "Absolutely not."

Q. "Well then, you talked it over with his lawyer, didn't you?"

A. "Absolutely not."

Q. "But you did talk it over with somebody, didn't you?"

A. "I did not."

Q. "You did tell somebody, at least, did you not, before you came on the witness stand, what you knew about this case?"

A. "I did not."

At this point, of course, the witness was hopelessly discredited.

These or similar questions should be put in a tone of voice indicating that some one suggested what should be said on the stand and almost invariably unless unusually intelligent or experienced with the courts, the witness will enter a strong denial that he has talked to anybody about the case. Where the cross-examiner believes the witness is honest and has testified to the truth, counsel should be restrained by a sense of fairness from putting this question to a witness.

If the negative answers are given, he is immediately discredited because the jury knows very well if the witness had not communicated the facts he knew to the adverse party or his attorney, he would never be in court as a witness. It would certainly be an astonishing thing if an attorney put a witness on the stand to examine him without knowing what he knew about the case or that he knew anything about it. Consequently when the witness says that he has talked to no one or told nobody what he knew about the case, he is obviously falsifying.

Strange as it may seem, even the truthful witness, who has testified honestly to every essential fact that he knows about the case, when this important question is asked him by the cross-examiner, will almost invariably deny that he has talked to anybody. Time after time, the truthful testimony of honest witnesses is discredited by their answering untruthfully the question "To whom have you talked about this case?" The safest course is to invariably instruct all of the witnesses to answer this question truthfully and to be on the alert for it so that their otherwise believable testimony will be accepted.

Never put a witness on the stand without instructing him, in advance, that this sort of question might be put to him on cross-examination and that he should have no

hesitancy in answering frankly that he had talked to the attorneys in the case and to the adverse party.

In any event, the question is one that only in rare cases can bring injury to the cross-examiner and should be put to practically every witness that takes the stand before the cross-examination is concluded. If this practice is followed, it will lead to some astonishing results.

The most startling result in the use of this question on cross-examination occurred in a case tried about fifteen years ago, in which a husband had filed suit against a defendant for the alienation of his wife's affections. The technical description for this action was "criminal conversation" and it was necessary to sustain the case for the plaintiff to actually prove an act of adultery by the defendant with the plaintiff's wife. The trial had run about three days and a number of witnesses had taken the stand and had testified to seeing the defendant with X's wife under various circumstances. Some had seen them riding together; others had seen them sitting under a tree in a park; still others had seen them walking late at night arm in arm. Near the close of the third day of the trial, the plaintiff produced his last and most important witness to prove the act of adultery.

He was a disreputable looking character by the name of Kehr, who testified that he had been standing alone in a dark alley on a given date and had seen the defendant and the wife of the plaintiff, enter the alley where the act in question was alleged to have taken place. He testified it was dark and that none was present but himself and the two offending parties. This testimony, if believed, completed the case for the plaintiff and rendered a large verdict almost a certainty.

Counsel for defendant must discredit this witness or meet defeat. The cross-examination proceeded as follows:

Q. "You have talked this story all over with the plaintiff or his counsel, have you?"

A. "No, sir."

Q. "Whom have you talked to about this case and about what you saw there in the alley?"

A. "No one."

Q. "After you saw this occurrence in the alley, who did you tell about it?"

A. "Not a soul."

Q. "Do you mean to tell this jury that you have never told a single soul about what you saw in the alley on that night?"

A. "No, sir."

Q. "Then, Kehr, will you tell the jury how the counsel for the plaintiff knew that you could testify to anything about this case and why you were subpoenaed here?"

The witness remained silent and looked doggedly at the floor. The courtroom grew tense and quiet. Counsel remained silent while the witness shuffled uneasily in his seat and after two or three tense moments, counsel for the defense said: "That's all sir. Your name ought to be spelled c-u-r instead of K-e-h-r."

The effect of this obviously perjured testimony on the part of this single witness was enough to blast the entire case of the plaintiff and a verdict for defendant was promptly returned.

CHAPTER 5

THE PERJURED WITNESS

This chapter will discuss the cross-examination of the wilfully untruthful witness. Previous suggestions made elsewhere in the volume on the same subject will not be repeated here. The term "perjured" is used in the broad sense as applying to any witness who is giving testimony he knows to be false whether it be concerning a material or an immaterial fact.

False testimony on the witness stand ranges all the way from a story which has been fabricated from beginning to end to mere wilful exaggeration. Often the cross-examiner may thoroughly discredit a witness by showing the falsity of his statements as to an immaterial fact where it is impossible to do so in respect to a material fact. If a jury is once convinced that a deliberate lie has been told, it is quite likely to disregard everything uttered by the witness.

Oddly enough, the strongest possible evidence of false testimony may be found in the two extreme types occasionally encountered—the witness who remembers everything and the witness who remembers nothing. These are easy to expose—the one who when hard pressed, can remember nothing and the one who narrates his story with such particularity of detail that the cross-examiner may justly suspect he has committed it to memory before taking the stand.

When the witness is driven into a close corner and, to avoid a damaging question on cross-examination, answers "I don't remember," and continues this attitude as to nearly all of the facts in the case which would oper-

ate against him if he is a party to the action or against the individual in whose behalf he has taken the stand, he, by this course, is almost certain to be discredited. Under such circumstances, it is not a bad plan for counsel to encourage him in this attitude.

It should be borne in mind that if the witness is conscientious and actually does not remember a conversation, fact or circumstance, he will usually not reply readily and will reflect a moment endeavoring to refresh his recollection before answering "I don't remember." The witness who replies "I don't remember" without a moment's reflection, is almost certainly lying.

At the other extreme stands him who testifies to the most minute detail of a transaction or occurrence and has his story thoroughly committed to memory. If the cross-examiner should suspect that the witness is telling a story he has committed or has rehearsed in advance, a very simple and effective test can be applied by asking him to repeat the same in his own language, just as he did on direct examination. If the story has actually been rehearsed in advance, almost invariably, he will begin at the same point in his narration as he did on direct examination, and will end it with the same language. As often as such a witness is called upon to repeat his tale, he will, in all probability, begin and end it with the same expressions each time.

If he is testifying truthfully to a narration of events, there is not one time in a thousand that he would employ the same language throughout the narration. Consequently, when a witness begins his story in the same way and employs almost word for word, the same language throughout, it is the strongest possible proof that he is lying. If the cross-examiner will have him repeat it several times and at different intervals, after other questions have been interposed, the identity of language will

be the more convincing. Counsel should then, before the final argument have the record of such cross-examinations written up and in his argument show to the jury that the phraseology of the several narrations of the witness are identical, with the result that the witness is almost certain to be discredited.

Again, when the witness is narrating a story that counsel feels quite sure is fictitious and has been carefully rehearsed, he may be thrown into confusion by asking him what he last said and then take him over the story backwards. If the story is fictitious, the witness will get into all kinds of difficulties in attempting to trace it backwards. For example, if he is narrating something that he claims he did, he can be asked to state the last thing he did in that situation and if he puzzles over the answer somewhat and is apparently rehashing the whole story in his mind, such conduct affords convincing evidence that he must rehearse it the way he has learned it before he can answer the question.

There are occasionally, however, witnesses who because of real or fancied grievances, have told their stories so often that they believe them. Individuals of this type ofttimes suffering from some slight mental derangement, can hardly start at any other place except at the beginning and go through to the end. One actual instance is of an aged lady who went into a law office to consult an attorney. She had a long, involved narration concerning her rights to certain property growing out of a will made by her sister. This required about one hour and a half to relate and when the lawyer attempted to interrogate her about certain parts which he wished to have cleared up, she was thrown into confusion and stated "Well, I must begin again at the beginning." It was impossible to obtain the facts from her. She was wholly unable to go backward over her story or to an-

swer any questions except to return to the beginning and relate it in its entirety.

There are dozens of witnesses of this type, but they can be readily detected on the stand as differing entirely from the type that deliberately falsifies or fabricates a story. Since fabrications are not usually consistent with the surrounding facts, being matters injected thereinto which do not belong there, minute cross-examination usually picks up a thread which when unravelled, exposes the falsity of the whole story.

The evasive witness we have already discussed at some length—the one who when pressed closely by a damaging question, skilfully dodges it by relating something that, while germane to the point, is not by any means, responsive. Such a witness, while not actually falsifying, nevertheless, intends his answers to deceive and in effect convey a false impression. Again, the witness so given to exaggeration that scarcely anything he says is true is illustrated by the following cross-examination by William Henry Gallagher of the Detroit Bar:

In Palmer v. Detroit Amusement Corporation, tried in the circuit court at Detroit, plaintiff sought to enjoin the operation of an amusement park as a nuisance. Upon the question of laches, plaintiffs claimed that Henry T. Egert, who promoted the park, had misrepresented its character and had painted in glowing colors a high-class park for the cultured and refined and thus had lulled them into inactivity.

Upon his direct examination, Egert denied these representations, but his tendency to exaggeration was clearly demonstrated by cross-examining him upon an inconspicuous statement of his direct examination.

The premises in question had been a private estate. Egert, to stress the improvement his park had made, stated that when he bought the property eighteen months

before, a log cabin on an island in the river "was falling into the river." The cross-examination on this statement then proceeded as follows:

Q. "There was a log cabin there upon a little island?"

A. "Yes, sir."

Q. "Which side of that cabin was falling into the river?"

A. "The cabin was not falling in but the spiling around the island was rotted and still is. We haven't got to it yet."

Q. "The spiling was rotting?"

A. "Yes."

Q. "You said yesterday the cabin was falling into the river?"

A. "It will fall into the river, it was falling in gradually with all the foundations around it."

Q. "That fact did not justify your saying yesterday that it was falling into the river at the time you took it over, a year and a half ago?"

A. "You might say in a sense it is falling into the river, but not literally."

Q. "Did you not say the log cabin itself was falling into the river?"

A. "I would literally say it was falling in the river, because it will very assuredly if we don't do something."

Q. "You understand you are under oath?"

A. "I understand, yes."

Q. "You want this judge to take your word as honest and sincere?"

A. "Yes, what I mean is this, that the spiling around the log cabin is rotted and the earth has seeped there and at high water the water comes through the spiling all around and is washing all that dirt away; the cabin has not actually fallen into the river, but it is falling, past or future it is falling, it certainly is falling."

Q. "It is falling?"

A. "It is not falling, it is standing there, but will fall."

Q. "As a matter of fact you are rather prone to exaggeration, aren't you?"

A. "I don't think so."

Q. "That is almost essential to men in the selling game in these modern days of dynamic salesmanship?"

A. "I am always able to come back and develop a good clientele wherever I have sold."

Q. "The modern salesman must first enthuse himself and then go out and enthuse the auditor?"

A. "Honestly, yes."

Q. "Modern salesmanship makes the modern salesman prone to exaggeration?"

A. "I think a salesman can be enthusiastic and can deal honestly."

Q. "It is pretty hard for the salesman?"

A. "If he has the goods in back of him, no; if he has the right goods in back of him it is an easy matter."

Q. "There was no occasion for your telling the court this log cabin was falling into the river a year and half ago?"

A. "I don't think so. I think it was falling, if the entire foundation is gradually seeping away that is part of the log cabin property."

Q. "Would you say that this testimony was evidence of your own over-enthusiasm or exaggeration or disregard of the facts?"

A. "I referred to the log cabin property on the island."

Q. "You refer to the island itself as seeping away?"

A. "That is what I had in mind."

Q. "And you expected the judge to distinguish between your statement and your intention?"

A. "I didn't expect anything, I just told it as I thought of it.

Q. "If I had not brought the matter out the court would be justified in supposing that your testimony was accurate and true?"

A. "I presume he would."

Q. "Don't you think that the same loose manner of speech that you have shown here may have been characteristic of you when you were talking about your project also, to Palmer and to the reporters and other people?"

A. "I am enthusiastic at times, in anything I go into, but I firmly believe I feel honestly, that is my purpose—always have and always will."

Q. "Sometimes your enthusiasm may run away with you?"

A. "But it was always honest, I always mean to be honest and mean what I say, no bunk about it."

Q. "Very often these enthusiastic people let their enthusiasm run away with their judgment."

A. "When they are untruthful, yes."

In the same case, it was plaintiff's contention that the amusement park attracted a rowdy element. Defendant denied this and claimed it attracted an average run of citizens of all classes.

In preliminary announcements, Egert had published elaborate plans for proper police protection. With that basis, the cross-examination proceeded as follows:

Q. "In exhibit 7 you are quoted as follows: 'Every precaution will be taken, Egert declared, to prevent rude or unseemly actions. No rowdiness and no gambling will be tolerated.' Was that authentic?"

A. "Absolutely."

Q. "Did you at that time anticipate there might be some rowdiness there?"

A. "All public places are subject to that. I anticipated it that we would be ready."

Q. "What reasons did you have for suspecting there would be displays of rowdiness there?"

A. "There is plenty of it in Detroit. I was a stranger in town, I didn't know what I was up against."

Q. "You had an idea that the Detroit people were different from your Cleveland people in that respect?"

A. "I think I got that impression when I got up here, that the town was more of a melting pot, a working class."

Q. "And more likely to be rowdies among them?"

A. "There seemed to be more life up here."

Q. "And observing the kind of people we have here then you were looking for displays of rowdyism there in this park?"

A. "I was looking for proper police precaution, for anything might occur in the park, not particularly rowdyism, but should it occur, we should be ready; we had a lot of money there at night and we had to be prepared."

Q. "And you anticipated rowdyism?"

A. "Not as our main problem; I anticipated it I presume as everything else."

Q. "And the reason of your anticipation was that you knew the class that ordinarily attend parks of this type?"

A. "I knew the class that might try to come out to the park and that they were the carnival crowd, in an amusement park."

Q. "You knew that the display of all these enterprises would have the appearance of a carnival and would attract the ordinary carnival crowd?"

A. "No, not necessarily. That is the average impression of a Detroiter."

Q. "Why did you think that the carnival crowd would come to your place?"

A. "I didn't think they would be in this section it not being accessible to street-cars."

Q. "You didn't think they would! Didn't you just say you thought they would?"

A. "No."

Q. "I misunderstood you then. Read that back there, Mr. Stenographer. The stenographer reads the answer beginning 'I knew the class that might try to come out,' etc."

Q. "Did you hear that answer read?"

A. "Yes, sir."

Q. "What did you mean by saying you knew the kind of a crowd that might try to come out to this park? You said, the carnival crowd, what did you mean?"

A. "Why every place is subject, even city parks, to a certain percentage of people that might make trouble for you, especially in these days of the Volstead Act and I was ready for it, that is all, not that I anticipated it."

Q. "The city parks offer a certain type of amusement, distinct from the so-called amusement parks?"

A. "Yes, decidedly so."

Q. "And there are certain classes of people to whom the carnival idea has its appeal?"

A. "I don't know anything about that."

Q. "Why did you speak about it here a moment ago yourself voluntarily then; you pretended to know about it at that time?"

A. "I can not see that our amusement park has the appeal that the people who go to carnivals would feel; we have carnivals around town."

Q. "You testified voluntarily that you knew the type of people who might come out to your park, and that

there were carnival classes; you had in mind a certain type of people?''

A. ''Them and others.''

Q. You knew of a certain type of people to whom the carnival idea has an appeal?''

A. ''Yes.''

Q. ''And you knew that that type might come out to your place, thinking they might have a carnival time there?''

A. ''Yes.''

Q. ''Why should they come there looking for a carnival?''

A. ''I don't know why they should come.''

Q. ''Your reason is because the type of amusement you offer is the carnival type of amusement, is it not?''

A. ''I would not say so.''

Q. ''What is the difference?''

A. ''The management principally.''

Q. ''I am talking about the type of amusements.''

A. ''The carnival is a temporary proposition.''

Q. ''Offering what type of amusements?''

A. ''Some of them similar to ours.''

Q. ''Anything different from yours?''

A. ''Probably not any different, but not as many.''

Q. ''Then if you have the type of amusement that appeals to the carnival crowd, you are bound to get that crowd there?''

A. ''We will only get them once.''

Q. ''You are bound to have them come, aren't you?''

A. ''We will have some objectionables in the park, I don't know whether they are of the carnival type or what; we get some objectionable people in the park, and probably we attract some millionaires sometimes.''

Q. ''For the most part you have the same type of people there right along?''

A. "About the same type. I think we could in this town gradually improve that crowd by proper education. We can improve the class of people in that park, because we are at a great disadvantage in this town; we have been harrassed ever since we started the park because it is an amusement park. They don't know what a clean amusement park is; and there is the difficulty; if it was like the others, I or our investors would not have invested one nickel, if we ran the ordinary amusement park, the rowdies would absolutely dominate if you cater to them and the decent people would not patronize your park. Leave it on that small percentage we will have the better people in Detroit, we will have the churches there eventually, and if we can not get it we will have to close it up."

Q. "That is your 'regular line,' as you called it, in your earlier examination?"

A. "Yes, sir, that is what we can do."

Q. "You recognize the crowd you have there coming as not the crowd you hope to have in the future?"

A. "They are all right now."

Q. "You won't condemn your patrons, but hope to improve their character?"

A. "We can get the better class to come in with their children."

Q. "You know that in Detroit there is a general sentiment current that amusement parks of that type are places where respectable people ought not to go and are not found?"

A. "Yes, sir."

Q. "And you know the existence of that sentiment of itself deters the respectable element from frequenting those parks?"

A. "Possibly in this town."

Perjury in a witness can frequently be detected from the use of unusual language. In such cases, cross-examination as to the meaning of uncommon expressions can be profitably undertaken.

Thus, in Jacobs v. Kari, tried in the Circuit Court at Detroit, a written memorandum was offered in evidence, a dispute as to the source of which arose. Plaintiff denied that he had dictated or prepared it. A witness was produced by defendant, the sole purport of whose testimony was that he was present on an occasion when the exhibit was produced by plaintiff. Defendant's counsel then proceeded.

Q. "Did Jacobs admit that he was the author of this exhibit?"

A. "Yes."

The witness was then cross-examined by William Henry Gallagher of the Detroit Bar.

Q. "What do you mean by author of this exhibit?"

A. "What?"

Q. "What is an author of an exhibit?"

A. "What do you say?"

Q. "What do you understand by an author of an exhibit?"

A. "I don't understand you. I don't know what you mean."

Q. "Do you know what an author is?"

A. "I don't understand you."

Falsehood will never remain long consistent with truth. In one case wherein it was alleged that defendant had signed his name to two documents, he admitting the execution of the first but denying the second, the evidence relating thereto was so contradictory in its character that it was evident to all that perjury must have been committed. The two signatures were so much alike that the trial judge could not disbelieve the assertion of the

plaintiff that both had been executed by defendant. On the contrary the defendant so earnestly declared he had not executed the second that the court at length on his own motion sent for two experts in handwriting. When the first of these took the stand he was presented with the two exhibits containing the signatures and after studying them under his magnifying glass for a few moments responded to the inquiry regarding their genuineness, "This," indicating the first, "is genuine but the second is a forgery, it having been traced over its predecessor."

And surely enough upon holding them up to the light it could be easily observed through the thin paper, with the first superimposed upon the second, that the two were identical, each one fitting the other exactly. Human experience as well as the expert's testimony made the court know instantly that no individual could twice identically repeat his own signature no matter how many times it may have been written by him.

Thus the perjury was exposed and the defendant saved from embarrassment. In this instance the defendant's counsel was lax in not himself having had experts called in his client's behalf.

Do not fear a lie under ordinary circumstances. Believing in the truth of his client's statements counsel should have courageously submitted the exhibits without hesitation to every known test. It is impossible to demonstrate in open court that a falsehood is the truth.

One Sarah Jones left a will of some fifty paragraphs distributing a three hundred thousand dollar estate. Among the bequests was one of five thousand dollars to the lawyer who drew the will.

One paragraph read:

"The sum herein bequeathed to my attorney is given in consideration of professional services rendered to me

by him in the course of my lifetime and for advice and counsel in the handling of many business enterprises of value and importance to me."

The bequest was comparatively insignificant and the explanatory paragraph inconspicuous.

The will was contested upon the grounds of undue influence and mental incompetency. The attorney was offered as a formal witness merely to prove the death and the fact of an estate being left.

He was cross-examined at length, however, respecting the circumstances leading up to the making of the will, and it was then disclosed that he had acted for the deceased in no capacity other than to draft the will. The cross-examination continued as follows:

Q. "Paragraph 42 of this will reads as follows: 'The sum herein bequeathed to (here the lawyer was named) is given in consideration of professional services rendered to me by him in the course of my lifetime, and for advice and counsel in the handling of many business enterprises of value and importance to me.' Did you write that paragraph out in long hand?"

A. "I did."

Q. "Did you read that paragraph to her?"

A. "Yes."

Q. "You say there was never a business enterprise that you handled for her?"

A. "Well, I had given her advice."

Q. "About what else besides her will?"

A. "Well, matters of a confidential nature."

Q. "What were they?"

A. "I won't tell you."

Q. "Why won't you tell me?"

A. "Well, I won't tell."

Q. "You have said you never handled any business for her besides her will?"

A. "Yes."

Q. "And you never helped her buy or sell property?"

A. "No, sir."

Q. "And you never knew her to invest money in business?"

A. "No, sir."

Q. "And you never advised her about investing money in business?"

A. "No, sir."

Q. "And the only advice you gave her was about her will?"

A. "Yes, sir."

Q. "And the recital in this will that you were being given $5,000 for the handling of many business enterprises was not true, was it?"

A. "Oh, I had done a great many things for her."

Q. "That statement was not true was it?"

A. "I did some things for her that she considered was worth the amount."

Q. "The statement in this will that you were being paid for the handling of many business enterprises is not true, is it?"

A. "I don't say that."

Q. "You don't say it is true, do you?"

A. "I do not."

Q. "Do you know whether it is true or false?"

A. "I know that I have done a good deal for her of things."

Q. "Do you know whether that statement is true or false?"

A. "I can not say."

Q. "You have said you never handled any business enterprises for her?"

A. "Yes, sir."

Q. "And you were honest and truthful about that?"

A. "Yes, sir."

Q. "And if you were honest and truthful in your testimony, then you were not truthful in putting that in the will were you?"

A. "Well, I can not say that. I did not put in anything that I did not think was suitable."

Q. "Well, you knew that you never had handled a business enterprise for her didn't you, a single one?"

A. "Yes, I knew I had not."

Q. "Now, if you knew and know now that you never handled a single enterprise for her—why did you allow her signature to go under a false statement in this will?"

A. "Why, I considered what I had done for her was all right."

Q. "That is not the question. Why did you allow that woman to subscribe to a false statement in the last will that she was making?"

A. (No answer).

Q. "As a lawyer, you know that a will is the most solemn document a man can put his signature to, don't you?"

A. "Yes."

Q. "And you know that then, if ever, he should be truthful in his statements?"

A. "Yes."

Q. "Yet, writing it out in longhand, with your own hand, you prepared a false statement for this woman to sign, didn't you?"

A. "Well, I did not consider it false."

Q. "You knew it was not true?"

A. "Well, what next?"

Q. "Well, you knew it was not true?"

A. "Well, I didn't know that."

Q. "If you did not know whether it was true or false,

why did you prepare that and recite it as a reason for this bequest?"

A. "Well she considered that I was worthy of the bequest that she made, that is all."

Q. "If she considered you were worthy of the bequest you were given, there was no reason for inserting in the will a false excuse for giving it to you, was there?"

A. "I don't know why, but it is there."

Mr. Gallagher: "Read the question, please." (The last question was read by the reporter.)

A. "I don't know."

Q. "Was the inserting of this false statement in this will her suggestion or your suggestion?"

A. "It was her suggestion."

Q. "Did she tell you to offer a false reason for the bequest?"

A. "She did not suggest it in that way."

Q. "Did she suggest that you put into the will that you had handled for her many business enterprises?"

A. "I read it to her in longhand."

Q. "No. Did she suggest to you that you put in this will the false statement that you had handled for her many business enterprises?"

A. "I don't remember."

Q. "When you read this will to her, did you read that false statement along with the rest of the will?"

A. "I read what was in the will to her, every word of it."

Q. "And when you read that false statement to her, was there any expression on her countenance which indicated to you that she recognized that a false statement was appearing?"

A. "I didn't notice her. She was a woman of sound mind, but I don't know and could not see how she looked and acted."

Q. "If you could not see how she acted, how can you pretend to say that she was sound?"

A. "I did not notice her at that particular time."

Q. "Well, when you read out loud this false statement and heard your own voice speaking out a falsehood, didn't you stop to see how she was taking it?"

A. "I didn't."

Q. "Did you talk over with her in advance the putting in of this false paragraph?"

A. "No."

Q. "When was the first time she knew it was to be inserted?"

A. "When she found it read to her by me."

Q. "And as you read it, so far as you saw her, she never recognized that that false statement appeared?"

A. "I don't know whether she did or not."

Q. "So far as you know, it escaped her notice?"

A. "Yes. She seemed to know all that was in it. At the time that I delivered the first draft of the will to her, it contained this false statement, and it was left with her over night, for two or three days, and when I came back she told me that she had read it."

Q. "And when she told you that she had read this will, didn't she tell you that she had discovered false statements in it?"

A. "She did not, she made no reference to it at all."

Q. "Can you give us any reason for putting the false statement in the will?"

A. "I have no reason only that it is there. She wanted it that way as it was there. It was read to her."

Q. "You do not mean to say that she wanted to have that false statement appear there?"

A. "I read it to her. She made no objection to it."

Q. "Do you mean by that answer that she wanted this falsehood in there?"

A. "No."

Q. "Now, if she did not want this false statement in the will, why was it put in there?"

A. "It was put there, and she made no objection to it."

Q. "But it was put in without her suggestion in the first place, wasn't it?"

A. "I don't know."

Q. "She did not ask you to put it in the will?"

A. "No."

Q. "Now, if she did not ask to have it put in the will why was it put there?"

A. "I don't know."

CHAPTER 6

THE HUMOROUS AND RIDICULOUS

Humor injected into a lawsuit by the cross-examiner for the defendant is nearly always detrimental for the plaintiff, and, on the other hand, is correspondingly beneficial for the defendant, regardless of whether or not the case be civil or criminal. In civil actions, the plaintiff is in court usually attempting to enforce some right or to obtain redress for some alleged wrong. The more solemn the atmosphere of the courtroom, the better it is for him. If counsel for the defendant can somehow get a laugh out of the jury over some humorous angle of the case, the tension of the courtroom is thereby relieved and the gravity of the plaintiff's case seems, somehow, considerably diminished. Skilful trial lawyers know this very well and counsel for the defendant will, from the time he questions the first juror down until the time he makes his final argument, let no opportunity pass to get before the jury every humorous angle which the case affords. Nearly every situation has its ridiculous side and counsel for the defendant should direct his cross-examination accordingly. It should not be forgotten, however, that the sympathies of the jury as between the lawyer and the witness are almost invariably with the latter and the humor injected in the case should seldom take the form of ridicule. Such a course will often do more harm than good. It is better tactics to induce the witness to make himself ridiculous by his answers where this is possible. The following examples will show how this may be done.

An owner was suing the contractor for improper construction of a building. The latter was a colored man

who had called to the witness stand several experts who had all testified that the building, in all respects, was properly constructed. Among these was a colored man about thirty-five years of age who had been especially emphatic on direct examination in his approval of the building. He was cross-examined by the attorney for the plaintiff. This cross-examination was conducted with the fact in mind that a large majority of colored men of middle age are unable to count or read and that many members of that race are given to exaggeration and hyperbole.

Q. "How long have you been engaged in the building business?"

A. "Thirty years, suh."

Q. "I presume you are quite competent in that line of work?"

A. "Yes, suh, I won't take a back seat for nobody."

Q. "I suppose that you have engaged in other lines of work besides the building business?"

A. "I am a first-class house-mover, suh."

Q. "How long have you been engaged in the occupation of moving houses for a livelihood?"

A. "Thirty years, suh."

Q. "So you have been working at house-moving for thirty years and doing nothing else during that time, have you?"

A. "Yes, suh."

Q. "What other occupations have you followed?"

A. "I am a first-class stone mason, suh."

Q. "How long did you work at that trade?"

A. "Thirty years, suh."

Q. "While you worked at the stone mason trade, did you do anything else?"

A. "No, suh." (By this time, everyone in the court-room was smiling broadly.)

Q. "Have you followed any other occupation?"

A. "Yes, suh."

Q. "What is that?"

A. "I am a first-class machinist, suh."

Q. "How long have you worked at that trade?"

A. "Thirty years, suh."

At this answer, the entire courtroom burst into laughter which required vigorous pounding by the bailiff to silence. Probably the true explanation of this testimony is that this colored man was unable to count and did not know the meaning of the words "thirty years." To him, in all probability, it merely meant a period of time.

It seems incredible that a lawyer would be permitted to practice who has such an inadequate command of English as the following cross-examination discloses. Nevertheless these questions and answers are taken from an actual transcript of testimony of a case tried in the Circuit Court in a mid-western city. The cross-examiner was a Greek lawyer and the witness, a colored man. The question at issue was the speed of an automobile.

Q. "You said a little whiel ago to de Court and jury date your attention has been attracted to de Pudrith car by de slowness of de amount of speed dat it has passed you?"

A. "Dat is so."

Q. "De fact is, de trut, is, you tink, you imagine, you do not know fur sure, you can not wanter off, you can not swear dat you are telling de trut to dis jury as to de amount of speed dat was the taxicab going did you?"

A. "No, ah couldn't sweah to it."

Q. "How many feet, can you answer to de court and jury, how many feet can he go at de speed of de slowness of four to five miles an hour, at de space of time when he was attracted to your attention from de corner to de middle of the street, at de place where was de accident happened?"

A. "Well, suh, dat is somethin Ah could not answah."

Q. "Can you answer dis question; then your furder opinion dat you before rendered to de court and jury is not correct, is it either, then?"

A. "What ain't correct? Everythin Ah said is correct."

Q. "All right, now then, if you are so sure of dat you can so faithfully state to de court and jury, why don't you say, if you know, how far he can take at de speed of time dat he was attracted to your attention from de corner to de middle of de street at de place of de time where was de accident happened?"

A. "Says which?"

Q. "Respecting de speed which you say Mr. Pudrith used. Do you understand what I say?"

A. "I undahstand you mean like dis heah; foh me to tell you how fah he would have to go when he was going at de rate of speed ah said he was going, until he got to da place wheah he was at."

Usually, the witness when disconcerted or upset by an effective cross-examination, will disclose the fact either by contradictory testimony or evidence of embarrassment or confusion. There was one exceptional case of a witness registering the effect of a pointed question with a definite physical manifestation entirely apart from any we have enumerated. He was on trial upon a charge of robbery armed. Of course, it was necessary in establishing such a charge to prove that the robbers in the commission of the offense used some dangerous weapon. They had held up the prosecuting witness in this particular case by one of them pressing against the back of his neck, a circular piece of metal while the other defendants went through his pockets. The prosecuting witness, thinking that the metal pressed against his neck was a revolver and being unable to see it, promptly held up his

hands. He had taken the stand and had detailed the facts that he had been held up by the defendants with a gun and that they took from him $10.30. He identified the defendant. Counsel had been informed in advance of the cross-examination that this witness was exceedingly conscientious and could be depended upon to tell the truth.

The cross-examination follows:

Q. "You say these defendants held you up with a gun?"

A. "Yes, sir."

Q. "Are you sure it was a gun?"

A. (Here the witness paused and gazed about with a perplexed look. He slowly raised his right hand level with his head and snapped his finger, answering slowly.) "No, I am not sure."

Q. "Were you badly frightened?"

A. (The witness answered promptly.) "Yes, sir."

Q. "Now, are you sure you were badly frightened?"

A. (Again the perplexed look. Again up came the hand and another audible snap.) "No, to tell the truth, I was not badly frightened."

Thus the examination continued and each time counsel cross-examining asked a question which reached its mark, up would slowly go the hand and again would come the snap. The spectacle was unusual and highly amusing to the spectators. The conviction was for robbery not armed, instead of robbery armed.

Spectators as well as juries thoroughly enjoy seeing a lawyer bested by a witness in a verbal tilt. Some of our most experienced advocates have been completely floored by a keen witness. Here is an excellent illustration of this:

The detective on the witness stand was one of the most experienced of officers. He was cross-examined by a

well-known member of the bar of a great city. A part of his cross-examination follows:

Q. "You gave this man the third degree, didn't you?"

A. "I don't know what the third degree is."

Q. "Didn't you pound him on the face?"

A. "No, sir."

Q. "But you did stick your fist under his nose and tell him you would knock his d——— head off if he didn't squeal, didn't you?"

A. "No, sir."

(Questioners took up another line for one minute then returned as follows.)

Q. "You say you didn't give him the third degree?"

A. "I said I didn't know what the third degree was."

Q. "You wouldn't give him anything to eat or drink would you?"

A. "It wasn't meal time and it is the doorman's duties to feed and water the prisoners but I would have permitted him to drink had he asked for one."

Q. "You wouldn't let him sleep, would you?"

A. "Well, he didn't complain of being sleepy and furthermore, he looked wide awake as the confession was made at three P. M.

Q. "And you did give him the third degree, didn't you?"

A. "I don't know anything about the third degree."

(Questioner goes to another line for one minute and returns to the third degree.)

Q. "You don't know anything about the third degree?"

A. "No, sir."

Q. (Attorney whispers to his client and asks Wilson:) "Who was the oldest man who sat while the remainder stood."

A. "Lieut. Read sat."

Q. "Why did he sit and the rest of you stand?"

A. "Two reasons. He was the oldest man and also the ranking officer."

Q. "And you didn't give him the third degree?"

A. "I told you I don't know what the third degree is. I don't know what you are talking about."

Q. "Well, how long have you been on the police force?"

A. "Eleven years."

Q. "Eleven years on the police force and you have the nerve to sit there under oath and tell the jury, that you never heard of the third degree?"

A. "Heard of it. Oh, yes, I have heard of it."

Q. "Well, what do you understand by it?"

A. "I understand it is a subterfuge of lawyers used simply to befuddle the minds of the jury."

THE COURT: "Well, you finally got your answer."

The latter remarks of the court were rendered almost inaudible because of the laughter on the part of the spectators.

An amusing incident occurred in the cross-examination of a witness for the plaintiff in an alienation suit brought by one Meyers against Legodne.

One particularly stupid witness was called for the plaintiff and testified in brief that he had been around the Meyers home considerably as a visitor and that Mrs. Meyers always stayed in the company of Legodne, seeming to prefer his company to the company of Meyers. His testimony was not of very much importance to the plaintiff but was made so by the cross-examination. Counsel for the defendant on cross-examination questioned the witness as follows:

Q. "What did you ever see between Mrs. Meyers and Legodne which would indicate that Mrs. Meyers had

affection for Legodne?" (Entirely too broad. Opening for the door to disaster.)

A. "Oh, nothing very much. I just saw them sitting on the porch."

Q. "How many times did you see them sitting on the porch?"

A. "Oh, about every day."

Q. "You never saw them do anything there on the porch did you?"

A. "No, they just sat there and looked at each other."

Q. "But there was nothing about their looking at each other that was anything out of the way?"

A. "Oh, no, nothing out of the way, only you could tell by the way that they looked at each other that they were 'stuck' on each other."

The foregoing is a good example of how a witness should not be cross-examined.

One of our judges apropos of the brow-beating style of cross-examination, contributes this one:

A divorce action was being tried. The wife who was the plaintiff had testified that she had worked on the farm until life had become unbearable. She also testified that her son had worked there ever since he was born. The attorney for the defendant thinking that he had now surely caught the witness in a falsehood since a boy could not possibly work in the early years of his infancy, cross-examined her as follows:

Q. (Lawyer fairly roaring at the witness.) "Do you mean to tell this court that this boy worked on the farm even when he was a baby?"

A. (Quietly.) "Yes."

Q. (Attorney pounding the table and fairly shouting.) "Well, then be so good as to tell us what work this boy did on the farm when he was one year old?"

A. (Calmly.) "He milked."

The case of Marsh v. Marsh tried in one of our Circuit Courts some few years ago had a humorous angle which might well be related here. Minnie Marsh had brought suit against her alleged husband, James Marsh, for separate maintenance. It was the claim of the defendant Marsh that he had never recognized this woman as his wife. He resisted her suit for separate maintenance on the grounds that not only had he never agreed to be married to the woman but had never held himself out as her husband and that such a course on his part would be ridiculous because he had no affection whatever for her. He was carefully interrogated before the trial, if she had any missives from him or any letters indicating affection and he said she did not. In the trial itself, Marsh was called to the stand and cross-examined as a witness for the plaintiff, by attorney Frank C. Sibley, of the Detroit Bar.

Q. "You never had any affection for this woman?"

A. "No, sir."

Q. "You never kissed her."

A. "I may have kissed her."

Q. "But you never told her you loved her?"

A. "No, sir."

Q. "You never wrote any letters to her in which you said you loved her or expressed affection for her?"

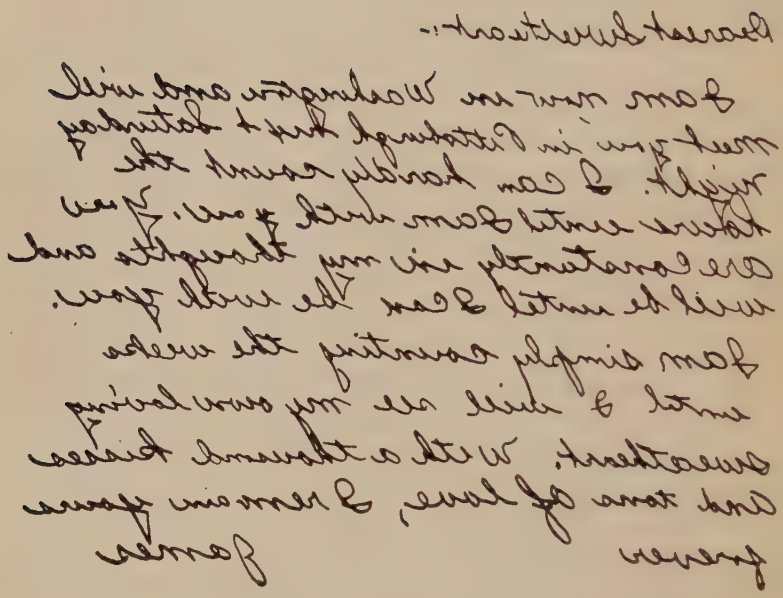
A. "No, sir."

Q. "You are sure of this are you?"

A. "Yes, sir."

Q. "I will now show you this piece of paper." (Counsel for the plaintiff had marked Exhibit "A".) "I will ask you if you ever saw this?" (Referring to Exhibit "A".)

EXHIBIT "A"



A. "I don't know whether I ever saw that or not. I can't tell."

The defendant was then withdrawn and the plaintiff was placed on the stand who identified Exhibit "A" as being a letter written to her by the defendant, James Marsh. Exhibit "A" at first glance appears to be written in some foreign language but counsel for the plaintiff

soon solved the problem. "Your Honor," said counsel for the plaintiff, "I offer this exhibit 'A' in evidence and I would ask you to kindly take a mirror and hold so that the reflection of this exhibit appears in the mirror." Thereupon counsel for the plaintiff produced a mirror, handed it to the judge who held the missive so its reflection appeared clearly in the mirror and thereupon the judge read Exhibit "A" aloud in the courtroom, which proved to be an endearing love epistle in the following language:

"Dearest Sweatheart: I am now in Washington and will meet you in Pittsburgh next Saturday night. I can hardly count the hours until I am with you. You are constantly in my thoughts and will be until I can be with you. I am simply counting the weeks until I will see my own loving sweatheart. With a thousand kisses and tons of love, I remain, yours forever.

"James."

A great many other letters written in a similar manner were read in the courtroom with the aid of the mirror amid the smiles and chuckles of the spectators. These letters shattered the defendant's case.

A clever cross-examination was conducted in a case recently tried in a United States District Court, which might well be classified as somewhat humorous. A prominent firm of New York stock brokers was suing a defendant by the name of Krokovsky for advances made by them upon the sugar exchange. The defendant contended that the transaction constituted gambling under

the state statutes and therefore the plaintiff was not entitled to recover. Benjamin F. Dyer of New York City, vice-president of the plaintiff concern, in testifying for the plaintiff, professed any ignorance of any gambling on the exchange, but admitted that he knew of some speculation.

He was cross-examined in part as follows:

Q. "How do you distinguish between 'speculation' and 'gambling'?"

A. "Speculation, as I understand it, is where a man uses his intelligence to further the price level of a commodity. In other words, if he thinks prices are too low and they should advance, economists tell us that he performs an economic function by buying in anticipation of that advance, and putting the market to the place where it belongs thereby helping to put the market in the place where it belongs, so as to have a proper effect on consumption. Reversely, as far as the selling end is concerned, he sells in anticipation of a lower price and thereby helps to put the market down, to increase consumption. On the other hand, gambling is just the same as anybody would flip a coin."

Q. "Let me see. A speculator uses his intelligence?"

A. "He uses his intelligence."

Q. "To buy at a low price, figuring against higher prices later on? Is that right?"

A. "Yes."

Q. "And he uses his intelligence to sell at a high price, figuring upon a low price later on?"

A. "Yes."

Q. "Now the gambler buys at a low price, figuring upon a high price coming, but without using his intelligence, I presume?"

A. "Yes."

Q. "And the gambler then sells at a high price, figuring upon a low price, without using his intelligence?"

A. "That is the way I understand it, yes."

Q. "So you distinguish between a gambler and speculator by the degree of intelligence between them, is that right?"

A. "Yes."

Q. "So, you would be a speculator and Krokovsky a gambler?"

A. "No."

Annie Wagner, then a recent immigrant from Prussia, was in 1893, charged in the Circuit Court at Indianapolis with the murder by poison of an old man named Koesters. His son, Charles Koesters, was a successful business man and Annie Wagner was a domestic in his family. The theory of the state was that the motive for the poisoning was the desire of the defendant to become the second Mrs. Koesters. The first wife had died but a few months before the tragedy came to light. Old man Koesters, the father of Charles, was violently opposed to the marriage of his son to Annie Wagner, while others of the family encouraged it. The state claimed that the poison administered to the victim was arsenic in the shape of rat poison.

The entire German element of the city was very much worked up over the case and a strong public sentiment had grown up against the defendant. The courtroom was crowded almost to suffocation from day to day and it was hard for the lawyers in the case to find seats at times.

The principal witness for the state was a druggist named Borst who testified that on a certain day, the de-

fendant bought from him a box of rat poison. He also testified that he knew the exact date as the law compelled him to put down in a record the dates of all sales of poison.

Henry M. Spaan, of Indianapolis, Indiana, cross-examined him as follows:

Q. "You have been very active in helping the prosecution in this case, have you not?"

A. "In what way do you mean?"

Q. "You have had frequent consultations with the prosecutor and his assistant, Mr. Duncan, about this, have you not?"

A. "Yes, several."

Q. "What do you mean by several?"

A. "Ten or twelve."

Q. "You appeared before the grand jury did you not, and testified there in this case?"

A. "Yes."

Q. "You also procured witnesses to appear before the grand jury?"

A. "Yes."

Q. "You also suggested to the attorneys for the state, names of witnesses for this trial did you not?"

A. "Yes."

Q. "You have frequently stated in public that the defendant is guilty did you not?"

A. "Not frequently, but I have so stated."

Q. "In fact, you have taken a very deep interest in this case for the side of the prosecution?"

A. "Yes, I have."

Q. "And you still feel that interest do you not?"

A. "Yes, certainly."

Q. "Before you sold this rat poison that you have testified to, did you know Annie Wagner, personally?"

A. "Not very well, I knew who she was."

Q. "How often had you seen her before?"

A. "Not often—two or three times."

Q. "Your observation of her was only casual was it not?"

A. "Yes."

Q. "You never had any occasion to notice her particularly at any time, did you?"

A. "No, I did not."

Q. "The sale of rat poison was of frequent occurrence in your store, was it not?"

A. "Yes."

Q. "In the neighborhood of your store, there is quite a German settlement is there not?"

A. "Yes."

Q. "Quite a number of German servant girls visited your store as customers did they not?"

A. "Yes, sir."

Q. "You speak German is it not so?"

A. "Yes."

Q. "You have described the person who bought the rat poison from you at the time you have fixed as having on a common blue working dress and a sun bonnet?"

A. "Yes, that is my recollection."

Q. "After you sold the rat poison in question you continued to sell it to other women in the neighborhood?"

A. "Yes."

Q. "Can you describe any of them, as to what kind of dress they wore?"

A. "No, I can not now."

Q. "Can you describe the color of the dress worn by any woman to whom you sold rat poison before the date fixed by you in this case?"

A. "No, I can not."

Q. "You have frequently seen women in your store

dressed similar to the one to whom you say you sold the rat poison in this case?"

A. "Yes."

Q. "Such dresses were quite common in that neighborhood were they not?"

A. "Yes."

Subsequently to the foregoing, the defense put upon the stand a German woman from the neighborhood of the Borst Drug Store. Her testimony was given to the jury through an interpreter. She testified in effect, that she was the woman who bought the rat poison from Mr. Borst at the date fixed by him and and that she remembered the date distinctly because she had a setting hen about to come off the nest with her brood on that day, and that she had kept a record of the date in a little book; that the rats were very thick in that neighborhood and that she concluded to use rat poison on them, and did scatter it about on the day she bought it. She also testified that she wore a blue dress on the day she bought the rat poison from Mr. Borst. As to the blue dress, she was corroborated by a neighbor woman.

The prosecution realized that this testimony was dangerous to its contention. The prosecutor, who was a man of more than ordinary ability, very carefully led the witness up to the date when she bought the rat poison. She then, in her slow German way, gave a detailed account of setting a hen some weeks prior thereto, and of how she had bought poison with which to kill rats just before the eggs were hatched.

Q. "How long before you bought this poison was it that you set the hen on the eggs?"

A. "Four weeks."

This answer, which nearly caused the collapse of the defense attorney, came deliberately. The jury was leaning forward tense with excitement. How was the witness

going to explain this discrepancy between her date and that fixed so surely by druggist. The answer to the next question would settle the fate of Annie Wagner. Everybody felt it. The silence was oppressive. The climax of the case had come.

Q. "Now then Madam, the record kept by the druggist shows that he sold the woman in a blue dress on a certain date, rat poison. You attempt to fix the date by the hatching of your chicken eggs and your date is a week wrong. How do you explain that?"

The witness, in her excitement, forgot all about the interpreter and shot back the answer in broken English.

A. "Mein Gott, dem vos duck ecks, und dey bin hatching four veeks."

Mr. Spaan, defense attorney, came back to earth happy. The prosecutor lost his triumphant air and the jury sank back in their seats plainly gratified with the completeness of the explanation. The jury were mostly farmers and they knew the difference between chicken and duck eggs.

The audience caught the effect of the German woman's reply and the laughter had to be suppressed by the bailiff. Thus do tragedy and comedy go hand in hand through our court trials.

Annie Wagner was acquitted after a short deliberation of the jury.

An agent sued a former employer alleging breach of an exclusive sales contract. In his cross-examination an exhibit consisting of a letter from the employer to the agent was shown him in which the employer stated the agent had agreed to send him daily reports. The agent denied that such an agreement was made. The cross-examination then proceeded as follows:

Q. "When you received this exhibit you recognized that the writer had been guilty of a falsehood in stating

you had so agreed, so why did you not deny there was such an agreement on answering?"

Defense Attorney: "We object to the use of the word 'falsehood.'"

The Court: "I think the question in that form is objectionable."

Q. "Well, we will put it this way. When you observed there had been a verbalogical inexactitude ——"

A. "It means the same thing to me, sir."

Q. "—— in the expression the writer used, why did you fail to point out that he was guilty of that verbalogical inexactitude in your answer to him?"

A. "Because at that time I did not know he was guilty of that verbalogical proposition."

Q. "You did not know that the statement made in that letter was inaccurate when you received it?"

A. "There had been nothing discussed by us in Toledo so I passed it over hurriedly."

Q. "You passed it over hurriedly?"

A. "Yes, that did not bother me at all."

Q. "Why didn't you say in your answer that there was no such agreement?"

A. "That rolled off my knife—it was Merry Christmas and I didn't care to."

Q. "That was all you cared about your agreement with your company, wasn't it—Merry Christmas?"

A. "No, sir."

Q. "Merry Christmas and it rolled off your knife?"

A. "No, I answered his letter most intelligently."

Q. "Who said so?"

A. "He said afterwards he liked the letter."

Q. "Did he tell you your letter was most intelligent?"

A. "He told me he liked the letter."

Q. "Did he say it was most intelligent?"

A. "No."

CHAPTER 7

PURSUE DEFINITE OBJECTIVES

In a previous chapter, the disastrous effects of attempting to cross-examine a witness without a definite objective was pointed out and the necessity stressed of pursuing such objective to a final conclusion. More cross-examinations are rendered ineffective as a result of counsel wandering therein, than by any other single factor. Sometimes, this occurs through the design of a cunning witness. At other times, the result is achieved by an evasive answer intended to merely avoid the question, which nevertheless, diverts the attention of the cross-examiner. Or again, the witness may be of the voluble kind who always answers a great deal more than the question requires. But regardless of the type, the cross-examining counsel must adhere persistently to each of his purposes until he has exhausted the possibilities in each direction. The persistency necessary to accomplish such results with an evasive witness is well illustrated by a portion of a cross-examination taken from the records of a recent murder case entitled People v. Prevost.

The defendant, Lloyd Prevost, was on the stand and was being cross-examined by Ex-Governor Groesbeck, who was the then attorney-general of Michigan. He was examining the defendant in regard to a shoe which the defendant owned and to certain foot prints the murderer had left in the snow at the scene of the crime.

A part of the cross-examination follows:

Q. "You swore that you did not have rubbers on that night, didn't you?"

A. "Yes, sir, I did."

Q. "You are sure of that, aren't you?"

A. "Yes, sir, I am sure of it."

Q. "Now is your eye-sight pretty good?"

A. "Yes, sir."

Q. "Just take that left shoe, will you please?" (Handing shoe to witness.)

A. "Yes, sir."

Q. "That is your shoe?"

A. "Yes, sir."

Q. "That is worn on the center of the shoe, isn't it? On the sole?"

A. "Yes, sir."

Q. "Right above the place where it is worn there is a nail, is there not?"

A. "Yes, sir, there is nails all over it."

Q. "I did not ask you that. What is your answer as to whether right above the place where the shoe is worn, there is a nail?"

A. "Why there is nails on the side of it, and there is nails on the top of it and there is nails on the bottom of it."

Q. "I will just ask you that question again. Will you read the question?"

(The last question was read.)

A. "I don't know which place you mean. It is worn and there is nails right close to it all the way around."

Q. "Just turn it so the jury can see?"

A. "Yes, sir (indicating) one there and one there and one there."

Q. "Now just a minute. Now, then, just read the question that I asked the witness?"

(Question repeated.)

JUROR COOPER: "The light strikes it so that we can not see it plainly."

Q. "How is that?"

JUROR COOPER: "All right."

(Question read.)

Q. "Do you mean to tell this jury——"

MR. HOSNER: Let him answer the question."

Q. "You just wait a minute."

MR. HOSNER: "I object to the attorney's interrupting; he has asked the question. He ought to give the witness a chance to answer it."

THE COURT: "He may answer the question."

A. "There is nails up above it and there is nails on the side of it."

THE COURT: "Just answer that question."

A. "Which nails are you referring to?"

Q. "Read the question?"

(Question repeated.)

THE COURT: "The question tells you."

(Question again repeated.)

A. "There is two nails above it."

Q. "Read the question again?"

(Question repeated.)

Q. "Right above?"

A. "Well, there is two nails above."

Q. "Right above?"

A. "There is a nail there."

Q. "You finally see it, do you?"

A. "Yes, sir, there is two of them."

MR. MCNAMARA: "I object to that comment."

Q. "It is a question; it is not a comment."

MR. MCNAMARA: "He can tell the witness how far above it is. There are nails all above that place there."

A. "I don't know which nail you are referring to. There is two nails above it."

Q. "You understood me when I said right above it, did you not?"

A. "I did."

Q. "It is right above; there is a nail there, is there not?"

A. "There is a nail above, yes; there is two of them there."

Q. "Right above it within a quarter of an inch there is a nail, is there not?"

A. "There is two nails above it."

MR. HOSNER: "Oh, answer the question if you understand it."

A. "Well, there is two nails. I don't understand which nail he is referring to."

MR. NUNNELEY: "I object to that."

MR. HOSNER: "I don't ask you whether I will say anything or not."

Q. "Ask who?" (Danger of diversion here.)

MR. HOSNER: "This gentleman over there, the special prosecutor."

Q. "May I proceed, your honor?"

THE COURT: "Yes, proceed."

A. "There is a nail in the center of the shoe."

Q. "Right above the worn spot of the shoe?"

A. "What would you call this other place, where that other nail is?"

Q. "You knew what I meant when I asked you whether there was a nail right above the worn spot of the shoe, did you not?"

A. "I did not."

Q. "Do you understand what I mean now?"

A. "I see what you mean now, yes."

Q. "Now, then, do you see that right above the worn spot on that shoe there is a nail?"

A. "Yes, sir."

Q. "You see that plainly, don't you?"

A. "Yes, sir."

Q. "I will ask you to look at this exhibit. (Handing photograph to the witness.) Get it under the light so that you can handle it?"

A. "I can see it here plainly."

Q. "You can see it plainly, can you?"

A. "Yes, sir."

Q. "Do you see on that picture in the imprint of that shoe or in the picture of the shoe print, anything to you indicating a nail in the shoe that the man wore that night when he made those tracks?"

A. "I do not."

Q. "You do not?"

A. "No, sir."

Q. "You do not see any spot there that indicates that to you, do you?"

A. "I see spots all over."

Q. "That is not the question."

MR. HOSNER: "We submit that is a proper answer."

THE COURT: "He does not answer the question."

MR. HOSNER: "If there are spots all over it, how can he pick one particular spot?"

Q. "I am going to point this out to you and I wish the jury to see the spot that I am pointing out (indicating). Do you see the spot that I have pointed out to the jury, just above the dark line in the picture?"

A. "What are these here, nail spots too?"

Q. "So that the record may show, you are asking me what these spots here are (indicating)?"

A. "Yes, sir."

Q. "They are within an inch or two,—the ones that you are referring to here and between the two imprints, foot prints, are they not?"

A. "Yes, sir."

Q. (To the jury.) "Has everyone seen that, who wishes to see it?"

MR. MCNAMARA: "I submit, if your honor please, that the exhibits should be given to the jury and let them look over this without counsel giving testimony and pointing out certain things."

Q. "I have a perfect right to keep my pen point on the point I wish to call to the attention of the jurors."

MR. MCNAMARA: "I take exception to counsel giving testimony in this case, pointing out what he sees in the picture."

Q. "Now then, witness, do you see that spot right above the dark line of the shoe print?"

A. "I see spots all over it."

Q. "I didn't ask you that question. Just answer the question."

A. "I see that one particular spot you are pointing to, yes."

Q. "Now, then, have you answered it?"

A. "Yes, sir."

CHAPTER 8

THE CHARACTER WITNESS

Parties in both civil and criminal actions are frequently assailed by the character witness who testifies that the reputation of one of the parties to the action is bad for truth and veracity or depending upon the nature of the criminal action, that the reputation of the defendant for honesty or for morality is not good. The usual form of the question in courts all over the United States is: "Are you acquainted with the reputation (of the party involved) for truth and veracity in the neighborhood in which he lives?" The answer to this question should be either "yes" or "no." If the witness answers "yes," the following additional questions are then propounded. "What is that reputation, good or bad?" The answer of the impeaching witness is, of course, always "bad."

If the cross-examiner will carefully study his witness or put to him a few additional questions, he will be able to determine, from the answers whether or not the witness is of sufficient intelligence to comprehend the meaning of the word "veracity." Frequently the testimony of such a witness, especially if he is not well grounded in English, may be severely shaken by asking him, point blank, to define the word "veracity." The following successful cross-examination of a witness of this kind, occurred recently in one of our criminal courts:

Q. "You have stated that the reputation of this witness for truth and veracity is bad?"

A. "Yes." (With much emphasis.)

Q. "Will you please define for the benefit of the jury, the word 'veracity'?"

A. (Here the witness shuffled uneasily in his seat and hesitated.) "I answered that I knew his reputation for truth was bad, but I am not sure that I know what veracity means."

Q. "But you swore that his reputation was bad both for truth and veracity, did you not?"

A. "Yes, sir."

Q. "And you swore that his reputation was bad for veracity without knowing the meaning of the word?"

A. (Witness very uneasy, by this time, and considerably flushed, did not answer.)

Q. "And, therefore, not knowing the meaning of the word, you could not know whether or not you were telling the truth?"

A. "I guess that's so."

Q. "And so you do not know whether or not you told the truth when you said his reputation was bad for truth and veracity?"

A. "In so far as veracity is concerned."

Again, the cross-examiner should keep in mind that most people are reluctant to take the stand and attack the character of another unless actuated by enmity, and if the cross-examiner concludes that such is the case, he should question the witness closely with the view of bringing out any previous trouble or difficulty the latter may have had with the person he seeks to discredit. Nine times out of ten, it will be found that the man who appears to impeach character does so through personal animosity and bringing this fact out before the jury tends to nullify his testimony. Right at this point, it should be noted that almost invariably such a witness will at first deny any enmity towards the party against whom he is testifying; yet, if questioned closely, he will

likely admit some friction or trouble in the past which he will, of course, attempt to minimize. A witness who took this attitude was successfully cross-examined as follows. On direct examination, he had testified that the reputation of X was bad for truth and veracity. The cross-examination then proceeded as follows:

Q. "You are a bitter enemy of X are you not?" (The question was made as extreme as possible to draw a denial.)

A. "No, sir."

Q. "But you are an enemy of his just the same?"

A. "No, sir, I am not."

Q. "Are you on friendly terms with him?"

A. "I have nothing against him."

Q. "That was not the question. I asked you are you on friendly terms with X?"

A. "Yes, sir."

Q. "Then, am I to understand that you are a friend of X?"

A. "Well, yes."

Q. "Were you subpoenaed to come here and testify against X?"

A. "No."

Q. (Sarcastically.) "You came as a friend?"

A. "I came because Y asked me to come."

Q. "But you came voluntarily?"

A. "Yes, sir."

Q. "You came voluntarily to blacken the name of your friend?"

A. (No answer.)

If the witness says he was subpoenaed into court, one way to discredit him would be to have him assign that as a reason why he came. Suggestive questions along this line may commit him definitely on this point. The cross-examiner should then show that he had talked the

matter over with the adverse party and told him to what he would testify if called into court; that he gave this information willingly and that after all his presence in the courtroom is because he wants to be there and not because of the subpoena.

If the reputation of the party whose character is thus assailed is really bad beyond controversy, it is, by far, the better practice to bring out the enmity existing between the witness and such party and stop at that. It is sometimes excellent tactics to adopt the method of one old nestor of the bar who many times successfully used the following form of cross-examination on impeaching witnesses. After the witness had testified that the reputation of, say the defendant was bad, the cross-examination proceeded thus:

Q. "You say that his reputation for truth and veracity is bad?"

A. "Yes."

Q. "Who did you hear say that he was untruthful?"

A. "Well, I heard B say so for one."

Q. "Who else?" (Here the witness hesitates.)

A. "Well, C for another."

Q. "Who else?" (Here the witness hesitates.)

A. "Well, I can't think of any more just now."

Q. "How long have you known this defendant?"

A. "Oh, for a long time, ten years I should say."

Q. "What is the population of this county?"

A. "Oh, I don't know. About 200,000 people."

Q. "Well, then your testimony comes down to this —that out of 200,000 people living in this county, and for a period of ten years or more, you can recall to mind only two people who have spoken ill of this defendant. Don't you think that is pretty good record?"

This form of cross-examination is based upon the well-known fact that even though a person's reputation

may be bad, and even though very many people have spoken about it, it is seldom when a witness is called to the stand, that he can recall the names of more than one or two persons who have spoken disparagingly of the defendant.

The cross-examiner, when facing the character witness who has testified that the character of one of the parties to the litigation is good, will, in nine cases out of ten, have one of two objectives and perhaps both. The first objective will be to show that the witness had very little contact with the party in whose behalf he has testified, during recent years. The second will consist in showing, if he can, the personal friendship of the witness for the party or other interested motives. As a matter of fact, the community rarely comments on the good character of an individual, either man or woman, and scarcely any witness, in the usual run of cases, will be able to testify that any particular individual said the party was honest or said his character was good.

This discussion has previously pointed out that one called as an adverse character witness is almost invariably actuated by enmity or hatred. Just as certainly is the one called to testify to the good character of a litigant, actuated by friendship and a desire to help the defendant or the party litigant for whom he is called.

The following cross-examination shows how these facts may be brought out.

Q. "How long have you known the defendant?"

A. "For the past five years."

Q. "Were you subpoenaed to come here in court?"

A. "No."

Q. "Then, why did you come here."

A. "I came here to help him (the defendant) out."

Q. "So you are donating your time here to assist your friend?"

A. "Yes, sir."

Again, nearly always the witness will confuse his personal opinion with reputation. An example of this occurred recently in a municipal court, which is typical.

Q. "You say his reputation for truth and veracity is good. Who did you ever hear say anything about his reputation?"

A. "Nobody. But I have always found him on the square."

Q. "So your testimony that his reputation for truth and veracity is good, is based solely on the fact that he has not dealt unfairly with you?"

A. "Yes, sir."

Q. "And you do not know, of course, how he has dealt with other people?"

A. "No, sir."

Q. "Or what they say about him?"

A. "No, sir."

(At this point, a motion to strike out his testimony was granted.)

Another instance which illustrates how the character witness who is called to impeach the character of a party in an action, while professing neutrality or indifference can be easily shown to be hostile, occurred in an alienation suit tried some few years ago.

A man by the name of Meyers had brought suit against a boarder by the name of Legodne, for alienating his wife's affections. Both the parties were common laborers and not overburdened with intelligence. The facts briefly stated were that some fifteen months prior to the time Meyers had separated from his wife, which was about eighteen months before the suit, Legodne had come into the home as a boarder and had gradually usurped

the prerogatives of the husband in the home until finally Mr. Meyers was excluded from eating at the table with the rest of the family and was compelled to sleep in a room upstairs by himself. Meyers did not submit tamely to thus being banished. Many fights occurred between him and Legodne in which Mrs. Meyers as well as his two children, boys eighteen or nineteen years of age, joined, taking the side of Legodne. Each of these fights resulted in the defeat of Meyers who would always beat a retreat after being thoroughly licked, fleeing down the street, usually pursued by Mrs. Meyers, Legodne and his two boys. The old man must have been something of a sprinter because he was always able to outdistance his pursuers and usually took refuge in the Fire Engine House, some little distance away.

At the trial of the alienation case, both of Meyers' sons took the stand and stated that Legodne was an admirable man in every respect and as to their father, he had no occasion whatever to bring suit for divorce against their mother and that they were strictly neutral in the difficulty. One of them was cross-examined as follows:

Q. "You say you are neutral in this case?"

A. "Yes, sir."

Q. "How comes it that you are here in court testifying for Legodne?"

A. "Well, I had to come."

Q. "Were you subpoenaed?"

A. "No, sir."

Q. "You came because you wanted to come and help Legodne's side of this case against your father."

A. "No, sir."

Q. "Then why did you come."

A. (No answer.)

Q. "You have nothing against your father?"

A. "No, sir."

Q. "You have a friendly feeling towards your father?"

A. "Yes, sir."

Q. "Your father and mother have been separated now about eighteen months?"

A. "Yes, sir."

Q. "How many times have you seen your father since that time?"

A. "Oh, I see him two or three times a week."

Q. "When you meet your father on the road, do you speak to him or nod to him?"

A. "No, sir."

Q. "Why not?"

A. "There is no reason."

Q. "You have passed your father on the highway two or three times a week for eighteen months, you are perfectly friendly with him and yet you refuse to speak or nod to him, but you can give no reason?"

The witness remained silent.

On many occasions, a witness who is called to support the character of one of the parties to a litigation will assign as his reason for coming to court that he was subpoenaed and paid his witness fees. If interrogated closely as to his friendships for the party calling him, he will finally admit that he came because of friendship and not the subpoena.

An example of how such a cross-examination works out is found in excerpts from the record of a case tried last year where the fitness of a mother to have the custody of her daughter was called in question. She produced a number of character witnesses, one of whom was her next door neighbor. She was cross-examined as follows:

Q. "Why are you here in court?"

A. "Because I was subpoenaed here."

Q. "Were you paid your witness fees?"

A. "Yes."

Q. "How much?"

A. "Two dollars."

Q. "Is that the only reason you came here to testify?"

A. "Yes, sir."

Q. "How long have you known Mrs. X the mother?"

A. "About seven years."

Q. "How often do you visit her?"

A. "Three or four times a week."

Q. "You are real good friends are you not?"

A. "Yes, sir."

Q. "In fact, she is one of your best friends, is she not?"

A. "Yes, sir, I think she is."

Q. "Did she ask you to come here?"

A. "Yes, sir."

Q. "Do I understand you to say you would not come down here and testify for your best friend without a subpoena?"

A. "Oh, yes, I would have come without the subpoena."

Q. "If she asked you to come?"

A. "If she asked me to come."

Q. "And she did ask you?"

A. "Yes, she did."

Q. "So you really came because she asked you?"

A. "Well, yes, if you put it that way."

CHAPTER 9

PREVIOUS CONTRADICTORY STATEMENTS

The cross-examination of witnesses as to previous contradictory statements made by them affords a most powerful weapon. If said statements have been made orally, counsel should thoroughly inform himself beforehand as to the approximate date, time, place, and to whom and in the presence of whom, they were made. He should also inform himself, in advance, as to what, if any, other statements the witness made at the same time, respecting the subject-matter of the lawsuit, even though they may not be contradictory, as the witness will ofttimes readily admit that he was at a certain place at a certain time and made certain statements provided such are consistent with his testimony on direct examination, where he would not admit making contradictory statements or even admit being at the place in question, if he was interrogated about the contradictory statements first.

Consequently, in beginning the cross-examination, where the cross-examiner seeks to elicit from him the fact that he has made contradictory statements, it is good strategy to approach the witness by asking him if he did not make certain statements, at a certain designated time and place which are entirely consistent with the testimony which the witness has given on his direct examination. The witness, seeing nothing in this sort of a question to impeach or contradict him, will quite readily answer that he had made such a statement at the time and place mentioned, thus proving, from his own lips, two important essentials which counsel might not otherwise obtain; namely, that he was present at the referred time

and place and secondly, that the subject upon which he testified upon direct examination, was there discussed. It is well to go some little distance with the witness in developing the noncontradictory matter which he discussed at the referred time and place. He should then be asked, point blank, whether or not he did not make the contradictory statements which the cross-examiner is then seeking to get him to admit.

This course should be pursued only where counsel lacks satisfactory evidence to prove that the contradictory statements were made. If counsel is well fortified with witnesses who will testify that such contradictory statements were made, then he will be in much better position if the witness makes a flat denial of having made such contradictory statements, as, in that event, counsel may prove the falsehood by other witnesses, rather than to attempt to compel the witness himself to admit that he has made, on a previous occasion, such contradictory statements.

On the other hand when the cross-examiner is in possession of letters or other written evidence, containing statements by the witness which contradict his testimony given on direct examination, he is here in possession of a most powerful weapon and his objective then will be by cross-examination to get the witness committed as firmly as possible upon the proposition that there is no possibility of mistake or error in the testimony he has given on direct examination; that he remembers the transaction distinctly and that he could not, by any possibility, be mistaken.

After the witness has been thoroughly committed and re-committed to the truth of his testimony on direct examination, he should then be made to identify his signature or his handwriting on the letter or other written document which the cross-examiner holds. When

confronted by the cross-examiner with this written evidence, the witness will necessarily be compelled to take one of the following positions. He may say that the contradictory statements in the written evidence made by him, were false. If they were false, then they were obviously made for the purpose of deceiving some one and he should be closely questioned with respect to his motives in this regard. In such a case, the only possible loop-hole for him, to prevent his testimony from being utterly discredited, will be to take the position that he was misinformed at the time the contradictory statements were made. Even this defense will not be open to him, in most instances where he would be certain to have complete knowledge of the subject-matter in respect to which the statements were made.

An example of an effective cross-examination of this character occurred in the case where Miss H., an attractive young woman, sued Mr. S., a wealthy young man, prominent in their local society, for seduction and breach of promise to marry. Their acquaintance had extended over a period of a number of years and with the result, as the young woman claimed, that a child was born to them. The defendant, on his direct examination, denied that he had ever had any improper relations with the girl; denied that he had ever promised to marry her; denied that she was anything more to him than a friend and acquaintance. He admitted that he had taken her, on a few occasions, to a theater and other places, but his claim was that those social calls had been far apart and were of no particular significance. Counsel for the plaintiff, at the time he was cross-examining the defendant, had in his possession, a letter written by the defendant, couched in endearing terms and signed "with much love."

The cross-examination then took its course as follows:

Q. "Is it true that in 1910 (the date the letter was written) you had affection for the plaintiff?"

A. "No."

Q. "Had you had affection at that time for this girl, would you have told her so?"

A. "Yes."

Q. "But you are sure that you did not have any affection for her at that time?"

A. "Yes."

Here counsel hands the witness the letter and has him identify his signature."

Q. "This letter is in your handwriting, isn't it?"

A. "Yes, sir."

Q. (Counsel reading from letter.) " 'With much love, Yours, Arthur.' Why, if you had no affection for her, did you tell her 'with much love'?"

A. "She understood me."

Q. "Were you trying to deceive her?"

A. "No, sir."

Q. "On that date, did you have any affection for her?"

A. "No, sir."

Q. "If you did not have any affection for her, then, when you signed your letter 'with much love,' you were lying?"

A. "No, sir."

Q. "Were you telling the truth?"

A. "She understood me."

Q. "Answer my question. Were you telling the truth?"

A. "No, sir."

Q. "You were not trying to kindle in the girl's heart, the fire of love, were you?"

A. "No, sir."

Q. "So, when you addressed her in this way 'My dear

little lonesome girl,' that was rather affectionate, wasn't it?"

A. "Yes, sir."

Q. "A little more affectionate than you would address an ordinary friend, wasn't it?"

A. "Yes, sir."

The cross-examination must have been effective, as the jury returned a verdict of $35,000.

In Perfection Socket Co. v. American Forging & Socket Company, 222 Mich. 396, 192 N. W. 583, plaintiff sued upon a written contract to recover royalties covering an automobile top. On the first trial Edgar A. Rathbun, general manager of defendant, as a basis for a defense of failure of consideration, testified that he had designed the top in question.

A verdict for defendant was reversed by the Supreme Court and re-trial ordered. Meanwhile, it was discovered that defendant company had had a patent issued to itself as assignee of one of its employees, Warren W. Stoller.

Upon the re-trial, Rathbun again was a witness and testified that the top was Stoller's invention. The following cross-examination then ensued:

Q. "During the former trial while you were testifying, did you have in mind that Stoller was the man who planned and worked out this top?"

A. "I had in mind that he did it, worked out the mechanical improvements certainly."

Q. "In your testimony at that trial, did you claim that you had invented that top?"

A. "I claimed I was responsible for the production of this top."

Q. "Do you claim now to be responsible for it?"

A. "I do."

Q. "Did you claim at that time that you were the one who planned that top mechanically?"

A. "No, sir."

Q. "Did you mention Stoller upon the former trial as the one who is responsible for the top."

A. "No, sir. I don't remember it."

Q. "Do you recall that you were asked about that by your attorney?"

A. "I couldn't say."

Q. "Do you claim now to have designed this top?"

A. "No, I mean I did not work, do the work upon it mechanically."

Q. "Now you say that Stoller designed that top?"

A. "I say he designed it and built it up."

Q. "You did not design it?"

A. "I did not design it as you call it, in the patentability of the thing. In another sense, I did design it. I brought up the necessity of it."

Q. "Did you ever claim to be the designer of the top?"

A. "Not that I know of."

Q. "Were you the designer of it?"

A. "No, sir."

Q. "Do you recall upon the first trial being asked the following question by your attorney and giving the following answer respecting this top?

'Q. Now, who designed this top?

'A. I did.'

Do you remember that?"

A. "I will have to remember it."

Q. "You would like to forget it wouldn't you?"

A. "No, I would not."

Q. "Why do you say you will have to remember it?"

A. "Because you have got it in the record there."

Q. "We have got it down in black and white, haven't we? That is why you will have to remember it, isn't it?"

A. (No answer.)

Q. "That is right, isn't it?"

A. "Yes, sir."

Q. "If it was not down here in black and white you would not remember, would you?"

A. (No answer.)

Q. "That is a fact, Mr. Rathbun, isn't it?"

A. (No answer.)

Q. "You would forget that if we would let you, wouldn't you?"

A. (No answer.)

Q. "Don't you want to answer that question?"

A. (No answer.)

Q. "Well, won't you answer that question?"

A. (No answer.)

Q. "You have not lost your power of speech, have you?"

A. "Not altogether, no, sir."

Q. "Does your conscience smite you upon that proposition?"

A. "No."

Q. "There was no confusion upon your part at that time, was there?"

A. (No answer.)

Q. "You knew what you were pretending to talk about?"

A. (No answer.)

Q. "That was false, wasn't it?"

A. "No, it was not false as I understood it and as it intended to convey, no, sir, it was not."

Q. "Do you recall, Mr. Rathbun, when you were first placed on the stand, the sixth question asked you by your own counsel, Mr. Hicks, was:

'Q. And at that time, had the top been designed?

'A. It had.

'Q. Who designed that socket?

'A. I claimed to.

'Q. You did?

'A. Yes, sir'?''

A. "I remember that testimony. I think, if you will allow me to say so, that you and I are mixed up as to what I mean by 'design.' "

Q. "Well, how did you know what your lawyer meant by design, when he asked you who designed that socket?"

A. "I know what I meant when I testified there."

Q. "Do you know what 'design' means better now than before?"

A. "Yes."

Q. "When your attorney asked you here today who designed it, you said Stoller did?"

A. "Yes, sir."

Q. "When I asked you who designed it, you said Stoller did?"

A. "Yes, sir."

Q. "What do you now understand the meaning of 'design' is?"

A. "The way I understand, it means in relation to a patented article of this kind, would you allow me to explain? I claim to be responsible for that socket."

Q. "Did you intend in your testimony to say that you designed the socket?"

A. "No, sir."

Q. "You distinguish now between 'being responsible for production' and 'design'?"

A. "Yes, sir."

Q. "How far did you go in school?"

A. "Through High School."

Q. "Had you been through High School when the last case was tried?"

A. "Yes."

Q. "You were then the general manager of a one hundred thousand dollar corporation?"

A. "Yes."

Q. "And between your high school education and your business experience you had not learned what the word 'design' meant as applied to this sort of a matter?"

A. "No, sir. I knew what 'design' meant like all the rest of us have an idea of what 'design' means."

Q. "The idea all of us have is to conceive the idea, to draw the idea out?"

A. "I did not know that altogether."

Q. "Did you know that at all?"

A. "I knew it—to a certain extent."

In an action for fraud the former manager of a theater gave testimony as to its daily income under his regime. It developed that daily reports had been made, the correctness of which were certified to by this manager and which contradicted his testimony. Confronted with them he admitted their authenticity.

Cross-examination:

Q. "There is not any question at all but that these exhibits are the original daily reports prepared by your direction and certified as accurate by you?"

A. "There is no doubt of that."

Q. "And looking at these exhibits it is clear that you are either a consummate liar or you have no memory at all, isn't it?"

A. "So you say."

Q. "You won't dispute it will you in the face of these records?"

A. "No."

CHAPTER 10

RIDICULE AND SARCASM

Ridicule and sarcasm may be used with telling effect in cross-examination, but its reaction is deadly, unless aimed at the right individual. Generally speaking, it should be avoided with women or children, or the most obviously stupid of the male sex. It should never be directed against the personal appearance of the witness; say for example, because of shabby clothing, poverty, and the like. Either ridicule or sarcasm may be employed to the best advantage when dealing with the individual who is making an assumption of some quality he does not actually possess, as for example.

(a) Assumption of extraordinary goodness.
(b) Extraordinary skill or expert knowledge.
(c) Assumption of unusual veracity.
(d) The boasting witness.

It is quite possible to literally laugh a man out of court. The following occurred in the recent trial of a damage case and is an excellent example of what is meant.

An expert medical witness, rather youthful in appearance, was called to the stand. This doctor, in his direct examination, had testified that he was a general practitioner of ten years' experience. At the conclusion of his direct examination, the distinguished attorney who was to cross-examine him straightened up in his chair looked at the witness with a broad smile on his face and then put his hand to his mouth as if he could hardly restrain his mirth, and in a voice filled with chuckles asked:

Q. "How old are you, Doctor?"
A. "Thirty-three years old."

Q. "How long did you say you had been practicing?" (With evidence that he could hardly restrain his mirth.)

A. "Ten years."

Q. "All the time?" (This with a rising inflection indicating it could not be true and with a chuckle in his voice.)

A. "No. I was out three years."

(At this, counsel could hardly speak for laughing. Every juror's eyes were upon him. Here was three years gone out of the ten of his experience.)

Q. "Any more time out, Doctor?" (Again his voice filled with mirth.)

A. "Well, I was in the army two years." (Here counsel's mirth increased.)

Q. "But not in a professional capacity?" (Two more years gone.)

A. "No." (By this time, all the jurors were smiling.)

The witness had somehow become a joke. The result was, of course, accomplished almost entirely by the manner and attitude of the cross-examiner.

Where the direct examination discloses that the witness is inclined to assume qualities of superior knowledge, skill, strength or endurance, which he, by no means, possesses, then it is an excellent idea for the cross-examiner to encourage the witness to go just as far as he will in assuming these unfounded qualifications. Thus, for example, if he is boastful of his knowledge on a given subject, he may, by suggestion be induced to state that he knows more about the subject than any living person. While encouraging him to go the limit in boasting about his qualifications, counsel should treat him respectfully and courteously, assuming a manner that indicates he is giving the witness absolute credence in everything he says.

Thus, a witness who ran a small radio shop was testifying in a suit brought by him for the recovery of a bill for installing radio equipment. He testified, on direct examination, that he installed the equipment, that it worked perfectly and that he was entitled to compensation therefor. On direct examination, he dropped some remarks which indicated that he held himself in no mean esteem. Consequently, his cross-examination took the following course. Counsel proceeded in a very courteous and respectful manner:

Q. "I presume, Mr. B. that you have given a great deal of time and study to the development of the radio?"

A. "I certainly have."

Q. "And having given a great deal of time and study to the development of this subject, I presume we would not be going far wrong to class you as an expert on the subject?"

A. "Well, yes, sir. I think that if there are any experts on this subject, I ought to be classed as one."

Q. (Counsel still proceeded in a very respectful manner.) "And with all the study that you have given to this subject, I presume that you know as much about radio as any other man in this part of the country?"

A. "Yes, sir, I think that I do."

Q. "And to extend our field a little, perhaps as much as—anybody in the country?"

A. "Yes, sir. I think I do."

Q. "How long have you followed the occupation of installing radios as a business?"

A. "About two years."

Q. "What preliminary education have you had?"

A. "I never went any further in school than the eighth grade."

Q. "How many radio sets do you think you have installed in the last two years?"

A. "Probably four or five hundred."

Q. (Counsel now changing his attitude.) "What contribution of any importance did you ever make to the development of the radio?"

A. "None."

Q. "Yet, you say that you know as much about this subject as any living man?" (Sarcastically.)

A. "I did. Yes, sir."

Q. "Development in the radio field has been made by somebody else?"

A. "Yes, sir."

Q. "Do you know that Lee DeForrest has been working upon the radio and upon the various improvements since 1916 and he has developed a great number of improvements in the radio?"

A. "I don't know."

Q. "Don't you know what DeForrest has done for the radio?" (Sarcastically.)

A. "I have heard of him but I do not know what he has done."

Q. "Who has made the important improvements in radio during the past two years."

A. "I don't know."

Q. "And yet, you say you are an expert equal to any other man in the world."

On another occasion, a damaging witness had taken the stand and testified for the plaintiff. Counsel for the defendant had learned from outside sources that he was a member of a religious organization called "The Saints." He cross-examined as follows:

Q. "You have told the entire truth, have you?"

A. "Yes, sir. I am sure I wouldn't tell a lie on the witness stand for all the world."

Q. "Do you really mean that?"

A. "I certainly do."

Q. "Would you tell a lie off the witness stand?"

A. "No, I would not."

Q. "You mean to say you wouldn't tell a single small lie, off the witness stand, for all the wealth in the world."

A. "Yes."

Q. "Is that because you are a 'Saint'?"

A. "Yes, sir."

Q. "What is a 'Saint'?"

A. "Well, by that I mean, I can do no wrong. I am sanctified."

Q. "Let me understand you clearly. You say that you can do no wrong?"

A. "Yes, sir. God won't let me."

Q. "Will God let everyone else do wrong other than 'Saints'?"

A. "Yes, sir."

Q. "There are only a few saints in the world. Is that true?"

A. "Yes."

Q. "Only a few hundred?"

A. "Yes, that are really sanctified."

Q. "Then God lets most all the people do wrong but He will not permit you to do wrong?"

A. "Yes, sir."

Q. "And that is just as true as anything that you have testified to on the stand?"

A. "Yes, sir."

CHAPTER 11

SILENT CROSS-EXAMINATION

The trite old adage, "Silence is Golden," has, at times a pointed application to situations confronting the cross-examiner. Where the inexperienced witness has related a manufactured story on the stand, he will, almost invariably, be ill at ease, while giving his testimony. If at the conclusion thereof, the cross-examiner will gaze sternly at the witness and say nothing, the attention of the jury, judge and in fact, the entire courtroom will become riveted upon the latter and his uneasiness will steadily increase. If counsel continues to thus gaze on him for any considerable time, a minute or so, let us say, the tension in the courtroom will become almost unbearable.

In this situation with the ignorant and timid, counsel may sometimes roar out a question which will completely crush and wring from him the actual truth, as was done in the Lemersal case, hereinbefore discussed. But care must be used not to attempt this method against the wrong type. It will rarely prove effective on the experienced or intelligent witness. Then again, opposing counsel may even when conditions and circumstances are otherwise propitious, break up this method of attack by exclaiming "Why don't you proceed?" which, of course, tends to relieve the tension in the courtroom and diverts the attention of the jury to the speaker.

Again silence can sometimes be used with telling effect by the cross-examiner in those cases where a question has been put to a witness which he is reluctant to answer because of some fact he is desirous of concealing or for the reason that any answer he may make will place

him in an unfavorable light and therefore, he remains silent. Where circumstances of this kind exist, it is sometimes excellent tactics for the cross-examiner, after putting the question, to wait some little time for the answer until the courtroom has become tense and quiet, in the meantime, gazing fixedly at the witness and then inquire, mildly but clearly:

Q. "Did you hear my question?" (If the witness says "Yes," counsel may then continue.)

Q. "Did you understand it?" (If the witness answers "Yes," again, counsel may then shout with all the force at his command:)

Q. "Then, why didn't you answer it?"

Rare indeed is the occasion when a witness under these circumstances thus handled can make any coherent or intelligent reply and the effect is sometimes almost appalling.

Or sometimes after counsel has waited for the answer until silence has focused the attention of everybody in the courtroom on the fact that the witness has not replied and his obvious embarrassment, counsel may dismiss the witness with "That's all," having complete assurance that the jury will assume that had he answered the question, it would have been far more damaging than would have actually been the case.

Again, counsel may use silence effectively in cross-examination by rising slowly as if to question the witness and then with a tolerant smile towards him and an attitude that seems to say "Oh, what's the use, this witness is of no importance anyway," take his seat with the statement "I believe I do not care to cross-examine."

In one case that was tried where the defendant was charged with having held up a gasoline station and he called as a witness in his defense to prove an alibi one who was evidently an individual with a fairly decent rec-

ord but who had been persuaded to come on the stand and testify in order to aid his friend. At the conclusion of his direct testimony, the prosecutor gazed at him sternly, standing for at least two minutes or more. The courtroom settled down and the entire attention of the spectators, judge and jury were upon the witness, who grew very nervous and twisted around on his feet and refused to look the prosecutor in the eye. Finally, the prosecutor, when the tension in the courtroom had become quite unbearable, quietly said:

Q. "Do you want to go to prison?"

A. "No."

Q. "You are not sure that you saw the defendant on this date, are you?"

A. "No." (Weakly.)

Q. "That's all."

After the prosecutor said "that's all," counsel for defendant was afraid to call the witness back for fear he would collapse and let him go without further questions.

Where a witness has testified to circumstances that are damaging to opposing counsel, who may be called upon to cross-examine him, it is of the utmost importance to learn to smile while such testimony is being given. If damaging evidence is being produced against him and the lawyer for the opposing side looks highly elated over the evidence as it falls from the lips of the witness, the jury is quite likely to conclude that there is something about it that is really helping him and if at its conclusion the cross-examiner will say, in a sprightly tone of voice "No questions," he can ofttimes minimize the effect of very damaging testimony, where had he attempted to cross-examine, the adverse testimony would only have been strengthened.

Silent cross-examination has proved effective in many instances but the question which confronts the lawyer

from time to time is, "Will it work in the particular situation now before me?"

CHAPTER 12

CHILDREN

In the cross-examination of children certain psychological principles of the infant perspective must be kept strictly before us. Some of these principles are:

1. That a child is more unreliable than an adult in his powers of observation or in his ability to report correctly and completely, what he has seen and heard.
2. That a child is not more truthful than an adult, as is commonly supposed, and as a matter of fact frequently will lie. That a child's version of an event is likely to be mixed with his imagination.
3. That a child has not the power of giving his attention to other matters of interest when a great part of his time is occupied with the elementary actions of life, which in an adult require little or no attention because the same have become habitual and automatic in operation.
4. That most of the attention which a child gives in his early years to any occurrence is involuntary and that where he sees an event happen he will likely retain only the parts thereof that interest him or which he can associate with previous conceptions; and that his interests and his association of ideas are entirely different from those of an adult.

   For example, presume an accident occurred in which several people were killed and one wheel forced from an automobile and sent careening down a road and another car burned up. The two

impressive things about this, to a child, might not be the speed of the car, or that some one was killed, but the fact that one of the wheels went rolling down the highway and that a fire took place, both of which he could associate with previous ideas of hoop rolling or bonfires.

5. That a child is extremely imaginative and readily amenable to suggestion and that counsel calling the child as a witness, can if he so desires almost control the testimony which he will give in the case; that in the play of imagination, the child mind is far more active and fertile than the adult; that a large part of the child's reasoning is done by images rather than by words and that imagined things become real to him, and that these fabrications are told from the witness stand as the truth.
6. And finally, that the jury, whether man or woman, will instinctively have love and sympathy for the child. In the cross-examination of a child, the examiner faces most of the problems encountered in the examination of women, and others in addition. He must not be harsh, nor domineering and he must not impress the jury that he is wilfully leading the witness into erroneous statements, keeping in mind always the fact that the child may be testifying to either an imaginative state of circumstances, or from suggestions from interested parties.

How then may such a cross-examination be so conducted as to disclose the real facts is the question. It is important first for the cross-examiner to determine in his own mind whether or not the child has simply drawn the matter from his own imagination or it has been suggested to him. If the child is a son or daughter of one of the litigants and has had the story or occurrence re-

hearsed to him, then it may be advisable to fall back on the well-known device of asking him to whom he has talked about the matter. If he says "nobody," the jury will know at once that he is lying. If he is young, say under twelve years of age, the examiner may lead the child, permitting him to draw on his imagination in other fields, and after the jury has been able to see how readily he tells imaginative stories for real facts, they may disregard his testimony entirely.

Henry M. Spaan, of the Indianapolis Bar, relative to the cross-examining of children, makes the following observations:

"Cross-examining a child is very ticklish work. Sometimes children can be prevailed upon by their elders to tell a falsehood; when this is apparent, it is easy to get the child's confidence by leading him away from his story and getting him to talk about himself and then gradually lead him up to his story and ask him about a detail, ask him how he knows that—the chances are ten to one, he will say 'My father told me that' or 'I heard my mother say that.' Never ask him directly 'Did your father or mother tell you these facts.' He has been instructed to say no and you only make matters worse. Your success depends entirely upon the way you handle the witness. If you try to overawe him, you will scare him and make yourself ridiculous."

In the following example, a boy had become an important witness in a case involving an automobile accident. The child was eight years old. He was examined as follows:

Q. "Frankie, do you go barefooted in the summertime?"

A. "Yes, when it gets warm."

Q. "Is there any stream near your home, where you go swimming?"

A. "Yes, I and the other kids go into Big Run."

Q. "Do you know how to swim?"

A. "Yes, but not far, about two feet." (Many on the jury knew that if the boy could swim at all, he could swim twenty-five feet as well as two.)

Q. "Do you ever go fishing in Big Run?"

A. "Oh yes, lots of times."

Q. "I suppose you catch lots of fish?"

A. "You bet we do."

Q. "What is the most you ever caught?"

A. "Oh, we caught a big lot of them. Lots of times we caught two bushels." (Several members of the jury knew that a dozen fish would be a large catch for that stream.)

Q. "Big Run is pretty deep where you go in swimming, is it not, Frankie?"

A. "Oh, it's awful deep, way over your head." (Members of the jury well knew that the stream in its greatest depth did not exceed two feet.)

Here were four obvious untruths all within a space of five minutes and it is needless to say the jury disregarded his testimony given on direct examination.

That children visualize the picture of what they see without regard to the logical setting was illustrated by a rather comical incident which occurred in one of the Indiana courts. The transaction arose in Dekalb County. A farmer lad had taken a small load of melons to a country entertainment and a large crowd of boys gathered about the rig and began slipping the melons out of the buggy from the front while the owner was watching the back. Then when the front was being watched the melons were taken from the back. The entire result of the transaction was that the owner lost his load of melons. Several boys were arrested on a charge of stealing, among others, one Charles Smith, about twelve years of age, who took

the stand in a John Doe investigation by the prosecutor and testified as follows:

Q. "Charles Smith, did you, on the night in question, see Richard Cole with a load of melons at the Hardscrabble School?"

A. (Weakly.) "Yes, sir."

Q. "Charles Smith, did you see Richard Cole when his load of melons had disappeared?"

A. "Yes, sir."

Q. "Charles Smith, did you see any melons leave the rig of Richard Cole that night?" (The purpose of counsel was evidently to so frame this question that it would not implicate any one in particular and would be an inducement for the witness to answer truthfully. This, of course, would not work, with an intelligent adult, but with a somewhat stupid boy of twelve, it was highly effective.)

A. "Yes, sir."

Q. "Charles Smith, did you see how the melons referred to left the rig?"

A. "Yes, sir."

Q. "Charles Smith, will you be good enough to tell how the melons referred to, left the rig?"

A. "Hands."

Q. "Were there any arms attached to the hands which were holding the melons which you saw leaving the rig?"

A. "Yes, sir, arms."

Q. "These arms were attached to a body, were they not?"

A. "Yes, sir."

Q. "Now, Charles Smith, could you see the body to which these arms were attached?"

A. "Yes, sir."

Q. "How many pairs of arms and hands did you see removing these melons?"

A. "Three."

Q. "Now, Charles Smith, Frank Wilson was one of the boys attached to these arms."

A. "Yes, sir."

Q. "You could see him?"

A. "Yes, sir."

Q. "John Rosenberry was another?"

A. "Yes, sir."

Q. "Frank Williams another?"

A. "Yes, sir."

What the prosecutor was after from the outset was to secure the names of these boys and had he asked Charles Smith directly if he saw any boy take melons, he would without doubt have denied it.

Judge W. McKay Skillman, of the Detroit Recorder's Court, tells of an incident which took place several years ago when he was a member of the prosecutor's staff. A five-year-old boy was called to the witness stand by the defense in a robbery armed case to aid in establishing an alibi for the defendant. The boy testified that the defendant came to his home to visit his father at a certain hour of the day. The testimony, if believed by the jury, would have meant certain acquittal for the defendant. Judge Skillman, prosecuting the case, took a long chance, he relates, and pointing to the court wall-clock, asked the boy to tell the jury what time it was. The child stammered, hesitated and then said he couldn't tell time. The defendant was convicted.

In the cross-examination of children, it is of the utmost importance to bear in mind that they are wholly unable to reason out how an adult would act under a given set of circumstances. The child when fabricating on the witness stand will almost invariably narrate what was said

or done from a childish viewpoint. As illustrative of this tendency on the part of children is a case tried a number of years ago in which a parish house of a church had been broken into and something like $300 in cash taken together with certain other articles. Suspicion pointed towards a young lad of about seven or eight years of age, by the name of Toth. He was apprehended by the police and readily admitted the theft of the money and the other articles of value which were missing. However, he had on his person at the time of his arrest, only several dollars of the amount taken and could give no satisfactory explanation as to what became of the remainder. At first he stated that he had lost the money but after being held in confinement for a while, admitted that he had given the money to his father. He made this admission, however, only after repeated suggestions to that effect by the officers who had charge of the case. Upon his statement the father, a laboring man in one of the factories, was brought to trial for receiving stolen property. At the trial, the boy took the stand against his father and made a very excellent impression on the jury. Counsel tried in every possible way to break the force of his story but he stoutly maintained that he had given this money to his father; that he was telling the truth and nothing but the truth and that nobody had told him to testify to that state of facts. Towards the conclusion of his cross-examination, counsel put a few questions to the child which appeared so utterly inconsistent with the actions of an adult under the circumstances, that a prompt acquittal resulted. These questions were:

Q. "You say you gave this money to your father?"

A. "Yes, sir."

Q. "Whereabouts was your father when you gave the money to him?"

A. "In the basement fixing the furnace."

Q. "Had you ever given your father any money before?"

A. "No, sir."

Q. "When you handed all this money to your father, what did he say?"

A. "Nothing."

Q. "Are you very sure that he said nothing?"

A. "Yes, I'm sure."

Q. "So you handed this $300 to your father and your father took it and said nothing."

A. "Yes, sir."

Q. "Had you told your father that you had broken into the church?"

A. "No, sir."

Q. "Did your father know where you got the money?"

A. "No, sir."

Q. "Did you explain to your father where you got the money?"

A. "No, sir."

Q. "You simply gave the money to your father, your father said nothing and you walked away."

A. "Yes, sir."

Q. "Had your father ever asked you where you got the money afterwards?"

A. "No, sir."

Q. "Did you ever tell him?"

A. "No, sir."

The impossibility of such a thing happening without the father's inquiring where he got the money was too much for the credulity of the jury.

CHAPTER 13

THE FEMALE WITNESS

In the cross-examination of a witness of the gentler sex, the lawyer frequently meets with a special set of problems and delicate situations not otherwise encountered. Especially is this the case with young and attractive women. One thoroughly experienced trial lawyer stated the problem in this language:

"A woman witness is ofttimes death to the cross-examiner. If you press her too hard, she will weep or faint and thus get the sympathy of the jury in spite of the fact that you have revealed startling discrepancies in her story. If you exert the necessary patience to pin her down and make her answer your question, the jury may get the impression that you are persecuting her. If the witness is young and attractive, the sympathy of the jury is naturally with her from the outset of the examination. If she is old and unattractive, their sympathies are with her for a different reason. Regardless of her appearance, juries will always accord to her sex a certain amount of respect and consideration. It is only the obvious vixen who stands on almost an equal basis with men, when facing the cross-examiner."

Courtesy and fairness, then toward the female witness is a fundamental rule which can not be violated by an attorney without costly consequences. A cross-examination may be successful to the extent of disclosing perjured testimony on her part, but its effect may be entirely lost by creating sympathy for her by discourtesy and brow-beating. Apropos of the woman witness, Frederic T. Harward, of the Detroit Bar, has this to say:

"That man who cross-examines a woman faces indeed, a delicate task. They are quicker-witted than men and some of them seem to know intuitively what your next question is going to be and have the answer ready before you can ask the question. Then too, they use every weapon in their armory, smiles, coquetry, shrugs, sauciness, and if you press them too closely, they will resort to tears; then too they always have as a last resort, the ability to faint at a convenient and dramatic time. Yes, he is brave indeed who engages in such combat with a woman. A good woman is the noblest work of God, but this isn't the kind you unfortunately are always called on to cross-examine in court; you are often called upon to face those of whom Pope wrote: 'Oh, woman, woman, when to ill thy mind is bent, all hell contains no fouler fiend.' Yes, the cross-examination of a woman has been the rock upon which many a trial lawyer has wrecked his case. Approach them warily and with awe. Have your armor in good shape and your visor down, otherwise you may be the most seriously wounded when the combat is over."

The cross-examiner must indeed keep in mind that a woman has quicker intuition than a man. She can sense an oncoming question and the point which a lawyer is seeking to elicit; is usually more facile and resourceful in her replies than is the average man and much more successful in investing herself with an atmosphere of honesty and sincerity. A clever woman will repeatedly evade a direct answer to a damaging question without seeming to do so, and it requires the keenest sort of attention on the part of the cross-examiner to secure from her a fair answer to questions. It also requires patience and tenacity to follow such a woman through to the end of a successful cross-examination, thereby exposing the falsehood in her testimony.

Of course, it goes without saying that the only purpose in any cross-examination is to elicit the actual truth of the matter and, if the witness has told the whole truth concerning same, there is no need for a cross-examination except to show her bias and interest in the case and her friendliness towards the parties.

With those general principles in mind, how then shall the clever woman witness who has testified falsely be cross-examined. In the first place, it must be remembered that truth is always consistent with itself. Where a lie has been injected in the case—in other words, where something has been told which actually did not happen—the lie will not square with a dozen and one other facts in the case. Under such circumstances, the only way that the falsehood can be revealed is to show the inconsistency of the falsehood and this can be done only if the cross-examiner will examine the witness most minutely as to those phases of her testimony believed to be false, regardless of the time required to so do.

It should be noted also that there is a certain type of imaginative female witness who can scarcely answer the simplest question fairly. For example, if you ask her "How did you travel to and from the party that night?" Answer: "We always go in an automobile." Question: "Who was with you?" Answer: "I never go out without by husband." Question: "What hour did you return from the party?" Answer: "I never stay out after one o'clock. I always make it a point to get in before that hour." These questions and answers given are typical and it will, of course, be noted that the witness has not answered one of the questions propounded. In such a case, there is only one way to handle the situation—that is to have the question read and compel a fair answer. If this method is employed and the witness is courteously but firmly made to confine her answers to the questions

as put, she will soon be cured of the habit of answering everything except the pending question.

An example of the persistence which must be employed in dealing with the imaginative and voluble witness or the shifty and clever witness, is found in a divorce case tried some time ago in which the wife who was the plaintiff, was one of these imaginative witnesses who can scarcely tell the truth about anything, and all of her answers were a curious combination of truth and falsehood. The plaintiff had testified on direct examination that she had many times seen her husband go into various rooming houses with the woman who was the alleged member of the triangle in the case. On direct examination she testified:

Q. "Did you ever see your husband go out with this girl, Frances Berg?"

A. "Why yes. I have seen him go out with her many times and I have also seen him take her into rooming houses on many occasions."

On cross-examination, it became necessary for counsel for the defendant to discredit this testimony or lose the case, and the following cross-examination occurred, an excellent example of how necessary it is to adhere persistently to the point with an evasive and untruthful witness.

Q. "Now, Mrs. L. what have you seen with your own eyes between your husband and Miss B.?"

A. "I have seen him time and again take her out to Westwood Inn."

Q. "Within what period?"

A. "Within the past two years."

Q. "Will you name one time when you saw Mr. L. take Miss B. to Westwood Inn?"

A. "About eighteen months ago."

Q. "Who else was there besides Mr. L. and Miss B.?"

A. "No one. Just she and he."
Q. "How did you happen to be at Westwood Inn?"
A. "I followed them."
Q. "How did you follow him?"
A. "In a car."
Q. "You had a car?"
A. "Yes, I hired a car."
Q. "Hired a taxicab?"
A. "No, sir."
Q. "What sort of a car was it?"
A. "A Dodge car, also a Ford car."
Q. "Did you ride in two cars out to Westwood that night?"
A. "Different times."
Q. "I am talking about this incident."
A. "It happened to be a Ford car."
Q. "Who was driving it?"
A. "A friend of mine."
Q. "Do you know who the friend is?"
A. "Yes, sir, I do."
Q. "What is the name of the friend?"
A. "Mr. W. Sr." (Being obliged to name some one was the fatal mistake for her.)
Q. "How old is that man?"
A. "A man about forty or forty-five years of age, a man of family, in fact he is a relative of mine."
Q. "What time did Mr. L. start for Westwood that night?"
A. "About a quarter of six."
Q. "And did he start from home?"
A. "No."
Q. "Where did he start from?"
A. "316 Jay Street."
Q. "You and Mr. W. were there?"
A. "Yes, sir."

Q. "Waiting for him?"
A. "We were."
Q. "You went then, in this Ford car to follow him to Westwood?"
A. "Yes, sir."
Q. "How long did he stay there?"
A. "Until I guess about ten o'clock."
Q. "And what then did he do?"
A. "He left there."
Q. "With her?"
A. "Yes."
Q. "And where then did he go?"
A. "Must I tell that?" (Attempting to hide behind the cloak of delicacy.)
Q. "Why certainly tell it."
A. "He went to a rooming house."
Q. "And whereabouts was the rooming house, and what was the number?"
A. "A hotel on Fort street across from the Union Station."
Q. "And he was there for some little time, was he?"
A. "I don't know."
Q. "Did you and Mr. W. wait?"
A. "No."
Q. "When you got down to this particular place you and Mr. W. left?"
A. "When we seen them go in."
Q. "What time of night was it then?"
A. "About ten-thirty, I presume."
Q. "And then did Mr. W. drive you home?"
A. "He did."
Q. "Have you subpoenaed Mr. W. in this case?"
A. "I have Mr. W. yes."
Q. "Is he here?"
A. "He is."

Q. "In the courtroom?"

A. "He is. Mr. C. pardon me, you asked me if Mr. W. waited for me and then took me home?"

Q. "Yes."

A. "No, Mr. W. left me and I went home by myself."

(The witness here began to fear Mr. W. would be called to the stand and would not corroborate her.)

Q. "So, Mr. W. did not see Mr. L. go into the rooming house that night?"

A. "No, sir."

Q. "And Mr. W. did not drive you home on that occasion?"

A. "No."

Q. "Didn't you just testify he did drive you home?"

A. "I don't know."

Q. "Now, let's get this straight. He drove you out from Jay street to Westwood on the night you refer to, didn't he?"

A. "Yes, that has been two years ago." (Getting ready to dodge by reason of remoteness of time.)

Q. "And was it in the fall or spring?"

A. "Well, it was around about I guess, June, and he took me out to Westwood the following Sunday. Mr. L. took me to Westwood the following Sunday." (Trying to shift the issue.)

Q. "I don't care anything about this. I am talking about this incident."

THE COURT: "You went over the battle ground together, so to speak, the next Sunday?"

A. "I don't understand you. We went over the battle ground? He took me the same trip there that he took her."

Q. "Mr. W. drove you there?"

A. "Where?" (Stalling.)

Q. "To Westwood, on the occasion under discussion."

A. "Yes, sir."

Q. "Starting from Jay street at fifteen to six?"

A. "Yes, in a Ford car."

Q. "And you were trailing Mr. L.?"

A. "He didn't know who I was trailing." (Here she got counsel slightly off the trail.)

Q. "Who didn't know?"

A. "I was too humiliated to let anybody know what I was doing."

Q. "What did you tell Mr. W. you were doing there?"

A. "I just asked him to drive me."

Q. "Where did you pick him up?"

A. "At my home."

Q. "He came there and you told him you wanted him to take a drive?"

A. "Yes."

Q. "And then you drove down to Jay street and waited there until Mr. L. came out?"

A. "Yes."

Q. "Then when you went back to the car, you told Mr. W. to drive you to Westwood?"

A. "I did."

Q. "Did you trail along after Mr. L. or meet him there?"

A. "I kept his car in view quite a ways back."

Q. "When you got to Westwood, did you go in?"

A. "No."

Q. "How much ahead of you did he precede you?"

A. "About time enough to get his car parked. He was just going out of the car, when I got up there."

Q. "All right. How long did you stay there?"

A. "I stayed there just as long as they did and finally he came out."

Q. "They were there until ten o'clock?"

A. "Yes, sir."

Q. "And you and Mr. W. were waiting there until ten o'clock?"

A. "Yes."

Q. "Did you stay out in the car?"

A. "No, we did not."

Q. "Where did you go?"

A. "We drove around."

Q. "You mean that you drove beyond Westwood?"

A. "No, we just drove around through the yard and out the other way, and then Mr. W. had a little trouble."

Q. "With his car?"

A. "I don't know; he just got out and looked at it."

Q. "He did have trouble with his car?"

A. "I don't know."

Q. "You said he had trouble? Was it personal trouble or car trouble?"

A. "I don't understand you—'personal trouble.' "

Q. "Did he have a quarrel with anybody?"

A. "No."

Q. "All right, it was with his car. The Westwood driveway is plainly visible from the windows of the inn?"

A. "Very."

Q. "And you mean to tell this court that you and Mr. W. were driving around there, with your husband in there eating dinner with the woman?"

A. "I said we drove through as my husband and Miss B. went into the door and we drove through the yard and came onto the cement walk and kept on the cement driveway all the way around."

Q. "I was trying to find out how you put in this time

from about six-thirty until ten o'clock and you said you drove around. Do you say you drove around Westwood?"

A. "I didn't say that I drove around Westwood. You know Westwood too well to know, Mr. C., that it would be impossible to keep driving around Westwood. I said we drove right through and came out on the other side and we drove out and down as far as we could and back and then turned around and went back again."

Q. "You drove, then, beyond Westwood?"

A. "A little ways."

Q. "And then you came back?"

A. "Yes."

Q. "And what did you do then?"

A. "Stopped for a while and stayed in the car."

Q. "On the end of the concrete walk there in front?"

A. "Not directly in front, no."

Q. "Did you drive back into the yard and stop?"

A. "No."

Q. "About how many times did you go back and forth the whole of that three or four hours you spent there?"

A. "Quite a number of times—I can't remember."

Q. "All right. Where was your car, when Mr. L. and this lady came out?"

A. "Now, Mr. C., where was I sitting, did you say, when Mr. L. came out?"

Q. "Yes, where was the car?"

A. "As far as from here to the end of that wall—then he drove out." (Indicating about 30 feet.)

Q. "To the west of the entrance when he came out, or east—did he pass you when he came out?"

A. "No, he did not pass us."

Q. "You were as far as from here to the wall, sitting in the front of the car with the open top—ordinary touring top?"

A. "Yes."

Q. "And you were sitting on the front with Mr. W.?"

A. "I was sitting in the back."

Q. "And you watched Mr. L. drive out and go on?"

A. "Yes."

Q. "Now you remember that distinctly, do you?"

A. "I have done so many things in trailing Mr. L. that I would not remember the dates."

Q. "Do you remember this circumstance distinctly or not?"

A. "The circumstances I am relating now was—did not happen to be Mr. W. at that time. Mr. W. and his wife drove me out to Jay street and it happened to be another man who drove me out after Mr. L. this night." (The reason the witness shifted her position was due to the fact that Mr. W. was sitting in the courtroom at the time and she didn't know whether or not he would support her story.)

Q. "That is a new version of this trip?"

A. "There was several versions of this trip."

Q. "Then Mr. W. didn't drive you out to Westwood?"

A. "Not that night."

Q. "So it is not a fact that you and Mr. W. drove out to Westwood and he had trouble with the car?"

A. "I drove out with them and we had trouble with the car, as I know he did get out and look at the tires and the gentleman who drove me was named Mr. R."

Q. "Where is he?"

A. "He has left the city."

Q. "It was not Mr. W. at all who drove you to Westwood that night?"

A. "No."

Q. "And you didn't drive around with Mr. W. on that night?"

A. "No."

Q. "And it was not Mr. W. who had trouble with his car on that night as you related a moment ago?"

A. "I am telling you, it was not Mr. W. who drove me out."

Q. "And it was not Mr. W. who came back with you and saw these people go into this hotel in front of the Union Depot?"

A. "No."

Q. "And you never trailed Mr. L. with Mr. W.?"

A. "No."

Q. "Now who else was with you when you saw your husband go to Westwood Inn on any other occasion?"

A. "I didn't see him on any other occasion go to Westwood Inn."

Q. "Did I understand you to say at the beginning of this examination, you had seen your husband take Miss B. to Westwood Inn, time and time again?"

A. "I don't remember."

Q. "Well, did you?"

A. "No."

The effect of this cross-examination must have discredited the witness as the court rendered a decision in the case adverse to her.

CHAPTER 14

THE ALIBI

The alibi in criminal cases is often used by the defendant with marked success. If the accused can raise a reasonable doubt in the minds of the jury as to whether or not he was some place other than the scene of the crime when the offense charged was committed, he must be acquitted. Sometimes, the witness to the alibi is honestly mistaken as to the date when he saw the defendant. In other cases, he wilfully falsifies and, finally, in a very small percentage of cases, small indeed we will say, is actually telling the truth. It must be remembered that the witness will, in all probability, be testifying in regard to a casual meeting with the accused on a definite date some weeks, or, even months, previous to the giving of the testimony; and the first pertinent inquiry which will naturally occur to the cross-examiner in the class of cases is: Why is it that this witness remembers meeting this particular individual on the day in question and why is it that the witness remembers that he saw the accused on any certain day of the month so long a time ago? It is wholly unnatural for any individual to think back say to any definite Sunday or any other given day of the week, months previous, and remember whom he saw on that date, unless there was a special set of circumstances to have impressed his mind. Usually, the alibi witness will be primed in advance and will be able to give a set of circumstances which he claims does fix the matter in his mind. These circumstances will usually be either entirely fictitious or transposed from another date.

The alibi testimony on direct examination, can be grouped into the following general classes:

(a) Testimony of a casual meeting, in a city or town or other place of the accused.

(b) Testimony that the accused was actually with the witness at some event or function.

If the witness testifies that the meeting was a casual one, he should first be asked as to just when he was approached in regard to giving his testimony in the case. If he states, for example, that the casual meeting took place six months previous to the date of his testimony, and that he was not approached in regard to the matter until a few weeks before the trial, he might then be interrogated as was done in a recent criminal case, as follows:

Q. "Can you name any one else you met the same day that you met X. [The accused]?"

A. "No, sir."

Q. "You say that you met X on the 20th day of June. Can you name any one else you met on the 19th day of June?"

A. "No, sir."

Q. "Can you name any one that you met on the 18th of June?"

A. "No, sir."

Q. "Can you name any one that you met on the 17th of June?"

A. "No, sir."

Q. "Can you name a single individual that you met during the entire month of June?"

A. "No, sir."

Q. "During the month of June, you met, at various times and places hundreds of your friends and acquaintances?"

A. "Yes, sir."

Q. "At the time you met X, you did not, of course, know that he was charged with any crime?"

A. "No, sir."

Q. "As a matter of fact, you did not know that he would be charged with any crime?"

A. "No, sir."

Q. "And there was nothing about X, was there that would make you remember him any more than any other acquaintances?"

At this point, the witness must set forth some special circumstances as to why he remembers seeing the accused or his testimony will quite likely be disbelieved.

In most instances, where the criminal case is important it will not avail the prosecuting attorney to put the question on cross-examination, "To whom have you talked about this case," as the witness will, in all probability have been coached in advance by counsel for the accused as to how the same should be answered; but if he has not been coached he will certainly fall in the trap. If the alibi is fabricated and his testimony all talked over in advance, the witness will be especially sensitive on the subject and will be quick to say that he has talked with absolutely no one about it. If he takes this position he can of course, be discredited at once by methods more fully hereinbefore explained.

In the trial of one Walter Wysocki on a charge of robbery, some few years ago, a very attractive young woman by the name of Veri Tayland took the stand in order to prove an alibi for the defendant. This young woman made a very excellent witness. She testified with apparent candor and truthfulness that on the seventh day of February (at the hour when the robbery was committed), she went with her fiance to the home of Walter Wysocki to buy some second-hand furniture which had been advertised; that she had not theretofore been friends with

the Wysockis, but remembered the date because of the fact that she had returned from a visit to her mother in New Castle, Pa., on the sixth day of February and that this was the following day. She testified in detail as to what furniture she bought and also identified another witness to the alibi who was present. Her fiance also took the stand and supported her. The crime was committed on Monday, February seventh. She was cross-examined by Allen W. Kent, assistant prosecutor, as follows:

Q. "Who did you first tell that you were at the Wysocki home?"

A. "I didn't tell it to anybody that I can recall."

Q. "Do you know how you came to be here as a witness."

A. "One of the boys heard the case and they were telling Frank about it and Frank came to me and I was surprised and I said 'We had better go up and tell the truth,' and he said 'I think we had better.' We found out from the boys when the trial would come up."

Q. "When did you first hear about that?"

A. "About a week ago."

Q. "You remember back to the seventh of February, do you?"

A. "I remember reading the newspapers, some persons getting arrested and I didn't remember then until he told me."

Q. "The first you knew that Mr. Wysocki was on trial was a week ago?"

A. "Yes, sir."

Q. "That is the first you knew of it?"

A. "Yes, sir."

Q. "And you say you have a receipt from Mr. and Mrs. Wysocki?"

A. "I haven't it."

Q. "You saw it?"

A. "Yes, sir."

Q. "It is dated when?"

A. "February seventh."

Q. "Why do you remember that this was the seventh day of February when you bought this furniture?"

A. "Well, because I left my mother's where I was visiting in New Castle, Pa., on the 6th and I know that this was the day following after I got back."

Q. "The 7th came on Monday didn't it?"

A. "No, it did not. It was around the middle or the latter part of the week."

Q. "So you are absolutely sure that you weren't down to the Wysocki home on Monday but several days later in the week?"

A. "I am absolutely sure."

Q. "Witness, I now show you a calendar (here counsel produced a calendar showing that February 7th came on Monday) and I will ask you to look at that calendar and tell me whether or not you want to change your testimony?"

A. (Witness takes the calendar, looks at it for a moment and then says:) "This calendar must be wrong. I know that February 7th did not come on Monday."

At the conclusion of this witness's testimony, she was ordered held for perjury by the trial judge and within thirty minutes had made a complete confession as to the falsity of her testimony. Both she and her alleged fiance pleaded guilty to perjury. He was sent to the penitentiary for two years, she was placed on probation.

An alibi witness can be effectively discredited if he is testifying falsely and goes into too much detail in narrating the facts and circumstances which took place on the day in question. Especially is this true if that date is considerably prior to the actual time he is testifying. If he describes his movements in detail for that day, a simple but effective method of showing the falsity of his

testimony is to interrogate him in regard to his movements the day before or the day after the date in question. Unless there are some exceptional circumstances to impress the matter on his mind, he ought to remember his movements on any other given date just as clearly as he does the date on which the alibi is fixed. The witness who does not hesitate to describe his exact movements in detail on the day in question, will thoroughly discredit himself.

An illustration of this type of witness which became almost humorous before the conclusion of his testimony, occurred in a recent trial in one of our criminal courts. One Stanley Sandicki was being tried for robbery armed and upon the trial produced a witness by the name of Larson, who was a proprietor of a gasoline station. He testified that about the time the robbery occurred, the accused and three other men drove into his gasoline station ten miles distant from the scene of the robbery and ordered a tank full of gasoline. If his story was to be believed then, of course, the alibi was established and the accused's acquittal assured. He was cross-examined by Allen Kent, assistant prosecuting attorney, as follows:

Q. "How much gas did Sandicki order on this day in question?"

A. "He ordered five gallons."

Q. "How much did the gas come to?"

A. "A dollar and eleven cents."

Q. "How did he pay you?"

A. "With a two dollar bill."

Q. "Do you remember what change you gave him back?"

A. "I gave him back 89c; a half dollar, a quarter, a ten cent piece and four pennies."

Q. "How many men were there in the car with him?"

A. "Three."

Q. "How were they dressed?"

A. "One had a slouch hat on and two had caps. Sandicki had the slouch hat."

Q. "How soon after Sandicki had come in did you serve another customer?"

A. "About ten minutes."

Q. "Who was that?"

A. "I didn't know."

Q. "What kind of a car was he driving?"

A. "A Buick roadster."

Q. "How much gas did he buy?"

A. "Ten gallons."

Q. "How did he pay you."

A. "He gave me a five dollar bill."

Q. "How much did the gas come to?"

A. "Two twenty-two."

Q. "How did you give him his change?"

A. "I gave him two one dollar bills and the rest in change." (By this time the members of the jury had begun to smile.)

Q. "How long before that was it that you had sold gas to anybody else."

A. "About fifteen minutes."

Q. "What car was that?"

A. "A Ford."

In this way, the witness continued to describe five or six different cars. At the conclusion of his testimony, every one in the courtroom was smiling. Since the date in question was about ninety days previous, it was perfectly obvious that the witness was drawing on his imagination instead of his memory.

CHAPTER 15

DECEPTION, SPECIAL STATUTORY PROVISIONS AND LEGAL LIMITATIONS IN CROSS-EXAMINATION

Cross-Examination Where Deception Has Been Used in Obtaining Information

Admitted deception is abhorrent to most juries. Where a witness takes the stand who has obtained the facts concerning which he is testifying by stealth or indirection, it is profitable to inquire into the character of such deception itself. Cross-examination under such circumstances may be frequently directed toward showing from the witness's own mouth, the number of falsehoods he told to achieve his ends. Nearly always such inquiries can be pursued profitably, where the investigation concerns a civil suit or a minor criminal offense, but where it was for the purpose of uncovering a serious criminal offense, the jury are quite likely to conclude that the means justified the end and such tactics will avail counsel nothing.

In McLachlan v. Jarvis, a case tried some few years ago in one of our leading courts, a husband sued for alienation of a wife's affection. It appeared that the wife's sister kept a rooming house which was a trysting place of the wife and the defendant. The husband engaged a woman detective who rented a room there and finally won the confidence of all parties. Upon the trial she appeared as a witness for the husband. Inasmuch as her testimony covered numerous matters her cross-examination was very extensive. It was finally concluded as follows:

Q. "When you went to this house in the first place you told them your name was Martha Green?"

A. "Yes, sir."

Q. "That was a lie, wasn't it?"

A. "Well, yes."

Q. "Then you told them your occupation was nursing?"

A. "Yes."

Q. "That was a lie, wasn't it?"

A. "Yes, sir."

Q. "While you were staying there in the house you told them you had no employment?"

A. "Yes, sir."

Q. "That was a lie wasn't it?"

A. "Well you see, we have to do that in our business."

Q. "You mean you make a business of lying?"

A. "No, but sometimes we have to lie while carrying on our business."

Q. "And since you make a practice of lying, you become adept at it?"

A. "Well, there is no other way we can carry on our work."

Q. "And you get paid for doing this sort of work?"

A. "Yes, sir."

Q. "And you engaged in this sort of work because you are paid for it?"

A. "Yes, sir."

Q. "In other words, instead of being an amateur liar who lies for the fun of it, you are a professional liar lying for the money in it?"

Objected to.

COUNSEL: "I will not press the question. That is all."

Cross-Examination of the Adverse Party Under Statutory Provisions

Many states contain a statute substantially like the Michigan act which permits either party to call to the stand, the adverse party and examine him under oath in civil cases. The Michigan statute, Compiled Laws 1915, section 12554, employs the following language:

"Hereafter in any suit or proceeding in any court of law or equity in this state, either party if he shall call as a witness in his behalf, the opposite party, employee or agent of said opposite party, or any person who at the time of the happening of the transaction out of which suit or proceeding grew, was an employee or agent of the opposite party, shall have the right to cross-examine such witness the same as if he were called by the opposite party; and the answers of such witness shall not interfere with the right of such party to introduce evidence upon any issue involved in such suit or proceeding, and the party so calling and examining such witness shall not be bound to accept such answers as true."

The exercise of this right is of the highest possible value to the plaintiff in certain cases. Generally speaking, cross-examination of the adverse party should be resorted to:

(a) When the defendant is in possession of evidence of an essential fact which it is necessary for the plaintiff to prove in order to establish his case.

(b) When at the outset of the case, the defendant may take one of several positions as one of the essentials in the case and it is important for the plaintiff to know what position the defendant intends to take before presenting his testimony in the case.

(c) When the counsel for the plaintiff has reason to suspect that he may take the defendant by sur-

prise by calling him before he has the time to confer with his counsel or frame a story to meet the exigencies of the case.

The practice of calling the defendant and giving him a thorough grilling and dragging from him, in a haphazard manner, his story instead of allowing him to tell it in a connected manner, is nearly always detrimental to the latter's case. It robs his story of any interest it may have and compels the case to go before the court or jury disconnectedly in accordance with the dictates of the plaintiff.

Where the plaintiff calls the defendant to the stand and cross-examines him under the statute, he elicits from him, at the very outset, what his defense is going to be, thereby robbing his testimony of much of the interest which it might thereafter have. The jury, having once heard the story drawn from him by unfriendly hands before the plaintiff has rested, loses the interest which human beings always have in the unknown or mysterious.

There is an additional advantage in that it enables the witnesses for the plaintiff to concentrate their fire against the position which the defendant has taken in his cross-examination.

Here is an illustration of this sort of examination:

J. M. was the principal defendant in a chancery suit brought by the widow of G. M., who claimed that her deceased husband was a partner in M. Brothers, who ran a large department store. J. M. failed to appear in court when the trial started, although he was subpoenaed by plaintiff. He was found by the officer at his summer cottage at a lake, some seventy-five miles away from where the trial was held. Upon his failure to answer the subpoena, upon application of plaintiff, he was brought into court upon a bench warrant. This cross-examination is

interesting for two reasons. It illustrates, quite forcefully, how a defendant may ruin his case before he starts, by attempting to disobey process after service upon him and by lying about unimportant matters.

Cross-examination, under aforesaid statute, proceeded as follows:

J. M. "I am one of the partners of M. Brothers. I have been out to Wamplers Lake for a while. I was served with a subpoena but not right."

Q. "Why didn't you come in?"

A. "I say it wasn't served right on me."

Q. "Why wasn't it? You got it, didn't you?"

A. "There was two served out there."

Q. "But you got one of them?"

A. "No."

Q. "Never got either one of them?"

A. "No, I came in on my own accord to testify."

Q. "Oh, you came in of your own accord?"

A. "Yes."

Q. "Well, I thought this officer brought you in?"

A. "Well, he gave me a ride in. He had the machine."

Q. "You were waiting for a ride in. Is that why you didn't come?"

A. "No."

Q. "Why didn't you come when you have your own car?"

A. "Because the place I was, you couldn't get out with anything but an airplane."

Q. "Well how did you get out there?"

A. "How did I get out there? I was there for a couple of weeks. It rained for about two or three days there."

Q. "You mean you didn't come in because the weather conditions kept you out there?"

A. "Until the last subpoena, yes."

Q. "Well, where were you when you were served with the last subpoena?"

A. "Out in a cottage of a friend of mine out there."

Q. "And where were you when the officer came to get you yesterday or the day before yesterday?"

A. "I was just coming home from church going to my cottage. The church is about three-quarters of a mile from my cottage."

Q. "Well, did you walk that three-quarters of a mile?"

A. "I have to walk, yes."

Q. "Well, you could walk three-quarters of a mile, but you couldn't come into Detroit."

A. "I couldn't walk seventy-five miles."

Q. "Isn't there any cars out there to bring you in?"

A. "I got two there, yes. I couldn't get out, I told you, Wednesday. It was so muddy and wet I couldn't get out."

Q. "Well, aren't there telephones around there somewhere?"

A. "Sure, there are telephones."

Q. "Well, why didn't you telephone you couldn't get out?"

A. "Well, it is an awful thing to get Detroit with the phones they have out there."

Q. "Don't they have the same kind of phones out there they have here?"

A. "No, they don't have Bell phones out there."

Q. "Did you try to phone in?"

A. "Yes, but sometimes there are six or seven on the line; you couldn't get it for half an hour even get an answer."

Q. "Do you remember a week or two ago, that they came out with a subpoena, the first time."

A. "Yes."

Q. "You shut the door in the officer's face, didn't you?"

A. "I did not. He came in. The door was open and he came in and he said 'Hello there Jim.' I said 'Excuse me, go out and rap on the door and then I will answer you.' That is all. Then I hasped the door and I left him out because he didn't come in right."

Q. "Oh, when he went out to rap on the door, you locked him out?"

A. "I didn't."

Q. "What did you do?"

A. "I hasped the door and he says 'Jim, that is a good one.' That is what the officer said."

Q. "Did you allow him to come in that time when he rapped?"

A. "He didn't rap."

Q. "Didn't he serve you with a subpoena on that occasion?"

A. "He did not."

Q. "Well you wouldn't allow him to come in through the door?"

A. "He came right in himself. The door was open, and a man is supposed to rap and say a word before he comes in, even if he is an officer. He didn't rap."

Q. "Well, did he come in?"

A. "No."

Q. "He went right away?"

A. "No, he stayed around there. He said 'That is a good one on me, Jim.'"

COUNSEL: "Just a minute. I don't know how this is material."

THE WITNESS: "Not a bit."

COUNSEL: "Just a minute—as to the issue involved in this case."

THE COURT: "It is material to the court. I want to

know whether he is guilty of contempt of court and whether I should remand him to jail or not and Mr. — [plaintiff's counsel] is occupying the place of the court at present."

COUNSEL: "Just a minute; and may the record show that it isn't for the record in this case?"

THE COURT: "Yes, I think it has to be upon the record, besides I think contempt proceedings come right along with the case, because if this man is guilty of contempt of court, it will affect the credibility of his testimony. I want that in the record. You may proceed, Mr. ——."

COUNSEL: "I will take an exception to the testimony."

THE COURT: "I will say this, that a man who will wilfully lie in these proceedings, his whole testimony is not credible, and we have had the testimony of the officer as to what was done out there and now we are getting his testimony."

THE WITNESS: "Yes, sir, and I will tell the truth."

Q. "You have sworn to tell the truth?"

A. "You bet I will."

Q. "Well, when did you go to Wamplers Lake. It is Wamplers Lake, isn't it?"

A. "I go quite often."

Q. "When did you go out this last time?"

A. "About two weeks ago."

Q. "About two weeks ago? Do you remember about the day before Thanksgiving? Do you know Mr. Schwartz?"

A. "I know him."

Q. "Didn't he come out there?"

A. "He didn't say anything. He came right in and he says 'Hello there, Jim.' That is the words he said."

Q. "And didn't you take him out?"

A. (No answer.)

Q. "Now, wait a minute, you answer my question."

THE COURT: "Answer the question."

A. "All right, you asked me a question."

THE COURT: "Wait a minute, can't you keep quiet?"

THE WITNESS: "Yes, sir, I will."

THE COURT: "Well, you do so then."

THE WITNESS: "All right."

THE COURT: "Or you won't have a chance to testify here."

THE WITNESS: "Well, I want to say ———"

THE COURT: "Now, keep quiet."

THE WITNESS: "All right, I will answer—answer his question."

Q. "Did you tell him when he came in, you didn't want to talk about that in front of the other men?"

A. "I did not say that. No."

Q. "And didn't you ask him to come outside the door with you?"

A. "I said, 'Just a minute.' When we got out, I said, 'Rap before you come in.'"

Q. "And you locked him out?"

A. "I put the hasp on. That was my home."

Q. "You kept him out."

A. "I didn't keep him out."

Q. "You didn't unfasten the door?"

A. "He didn't rap. He said, 'That is a good one on me.'"

Q. "As soon as you get him outside, you shut the door in his face?"

A. "I didn't shut the door in his face. I went out with him myself outside."

Q. "How did you get away and leave him outside and you in there so you could hasp the door?"

A. "I hasped the door. I had that privilege."

Q. "And you mean to say he didn't try to get in again?"

A. "He didn't try to get in again."

Q. "Didn't you know he had a paper to serve on you?"

A. "That part was all right. I didn't know. He didn't say it. I didn't know what he was there for."

Q. "Didn't he tell you that is what he had?"

A. "He didn't say anything. He said 'Hello, Jim' like that. He is a friend of mine. I have known him since he was a kid."

Q. "Why did you take him out?"

A. "Because I thought he wasn't a gentleman enough to rap on the door before he came in, even if the door was open."

Q. "Well, when you hasped the door, you mean you can not open it from the outside."

A. "Yes, it was just simply hasped."

Q. "What do you mean 'hasped?' Could he have opened the door if he wanted to?"

A. "Not unless he forced it."

Q. "When it is hasped, a man outside can not get in unless you unhasp it?"

A. "No."

Q. "And you didn't unhasp it?"

A. "You are supposed to hasp it to keep people out."

Q. "And you didn't let him come in?"

A. "He had a right to come. He didn't undertake to come in."

Q. "And didn't some one there have a shot gun and say —"

A. "Nobody said anything."

Q. "Who was it had the shot gun?"

A. "There was a man on my land shooting ducks from the boat, but no one showed him it. He had gone

out with the gun. The gun didn't belong to me or even that man."

Q. "Was the gun there?"

A. "The gun was on the grounds on the next cottage next to me."

Q. "Well, you hasped the door and that is the last thing you saw of Mr. Schwartz, is that it?"

A. "The last."

Q. "Now, you were served with a subpoena two or three days ago, weren't you?"

A. "I was not. That is, a man came in—he didn't say, 'Who is Mr. M.' I didn't know the man. He ought to tell me. I didn't know."

Q. "Did he put a paper in your pocket?"

A. "No, he put a paper and it dropped on the floor and he walked out."

Q. "Did you pick up the paper?"

A. "I picked it up."

Q. "Did you read it?"

A. "I didn't read it. Nine dollars dropped out and I put that in my pocket."

Q. "You got the nine?"

A. "Oh, yes."

Q. "What did you think they were sending you nine dollars for?"

A. "I didn't know whether it was a service fee or not."

Q. "Well, you can read, can't you?"

A. "I certainly can read. I read that paper yes."

Q. "Do you know that it summoned you to come into court here?"

A. "I didn't —"

Q. "Do you know that it summoned you to come into court here?"

A. "It did, but I didn't know whether he was an offi-

cer; whether he had the right to serve it. He did not say he was an officer. He dropped it and ran right out."

Q. "Well, you had a lawyer up here, Mr. Ferguson?"

A. "Yes."

Q. "Why didn't you call him up and find out about this paper if you were so doubtful about it?"

A. "I didn't doubt it. I didn't doubt it; but I would have come the next day even at that, but I told you I couldn't get out from the lake. My health wasn't very good. In fact, I got a letter from the best doctor in the University of Michigan, not to be in any lawsuit or business at all, until I can do so. Mr. Ferguson will know that."

Q. "Now, you could go duck hunting, couldn't you?"

A. "I didn't go hunting or duck hunting."

Q. "What did you do out there?"

A. "Just superintend the works, tending to my own business."

Q. "What work were you doing out there?"

A. "I was putting in a break water, and putting in outside toilets."

Q. "Were you working yourself?"

A. "Yes, sir."

Q. "You are well enough to work outside?"

A. "Well, I ain't well enough to work outside, but I do it under order from the doctor, be outside, not work."

Q. "But you were not well enough to come into court?"

A. "I am here, ain't I?"

Q. "You are here because you were brought here. Do you know this man here?"

A. "Yes."

Q. "Didn't he compel you to come in?"

A. "No, sir."

Q. "Well you have been in the custody of the officer?"

A. "Well he did it, then, but he had no right. Do you want me to tell the circumstances? Well, I was coming back from the church yesterday morning. It was quite cold and when I got as far down as the place where I get my milk and eggs, when two men drove up in the machine. And one of them was supposed to be an officer from Adrian and he asked me if I knew C. L. a fellow who had a subdivision out there. I said, 'Yes, what do you want?' He said, 'I want to buy some lots.' This is the officer from Adrian. I said 'All right, I will show you. I will jump in your car and go as far as my cottage and then I can point. It is about three blocks east of that.' When I got to my cottage, I said 'There it is up there.' When I tried to get out they grabbed me. It wasn't right."

Q. "Well, if you had gotten out you would have hasped the door, wouldn't you?"

A. "I would not. I would have asked them to come in. And they grabbed and tried to put hand-cuffs on me. I said, 'Please don't. I am too old a man; two big strapping men like you.' "

Q. "How old a man are you?"

A. "Sixty-four going on sixty-five. And I said, 'Please don't do that' and he tried to put it on and then he said they were officers. I said, 'Please don't do it.' He said, 'Get around there, you great big bluffer,' he said, 'I will slap you,' 'I said, 'You can, I won't stop you.' That is the words."

Q. "This Adrian fellow was bigger than you, and he brought you in?"

A. "No, he wasn't bigger than me. He didn't bring me in. This man brought me in from Adrian."

Q. "The roads weren't in such condition that they couldn't bring their car in, were they?"

A. "Well, after we got on the road, it was good. This was the following day I was supposed to be here Wednesday, understand. This was Thursday."

Q. "Well, if you could go to church, three-quarters of a mile, couldn't you get your car and get in here when the court ordered you to come?"

A. "I had a car there but I couldn't get out."

Q. "Why couldn't you?"

A. "Why, it is a big heavy car."

Q. "Couldn't you get to a place where there was a car and get in?"

A. "I didn't know of any place."

Q. "You mean to say weather conditions were such two days ago that you couldn't get in here?"

A. "I couldn't get in. I will vouch for that under oath."

Q. "You told your lawyer you wouldn't come in, didn't you?"

A. "I told him because I had a letter forbidding me to be in any business legal or anything."

Q. "What I want to know is this: Did you refuse to come to court because your doctor told you not to, or did you refuse to come to court because you couldn't use your car to come?"

A. "Well, I would say, both of them. The weather conditions and what the doctor said. I didn't want to get out and catch cold and pneumonia. My health is worth something."

Q. "Who is this doctor?"

A. "Dr. Klingman, head physician at the University of Michigan."

Q. "What did he say was the matter with you?"

A. "Nothing the matter. He said 'Don't be bothered.' Nothing the matter."
Q. "Not to be bothered with lawsuits?"
A. "Anything legal."
Q. "Well, you are taking good care of your health?"
A. "I am trying."

Legal Limitations on the Scope and Character of the Cross-Examination

Legal limitations on the scope and character of cross-examination of witnesses in court are few in number and wisely so. Even as to such limitations and restrictions as do exist the courts are vested with a wide discretion in permitting deviations therefrom. The less the courts interfere with counsel while cross-examining a witness, the better will truth and justice fare in the case. Many times in conducting a cross-examination, counsel must go far afield in order to expose the falsity of the witness' testimony. What may appear to the court to be an irrelevant question may be an essential step in carrying out the objective of the cross-examiner. Every experienced lawyer has seen the court render a well-planned cross-examination abortive by some such remark as this "Now just what do you seek to prove by this question?" or "The court does not see exactly the relevancy of this question." Of course, counsel can not explain his objective to the court without exposing his motive to the witness he is interrogating, thus giving him an opportunity to fortify himself against the attack and thereby nullifying the cross-examination.

There is considerable conflict of authority as to the scope to which the cross-examination of a witness may extend. In England, Canada and many of the states when a party produces a witness and examines him, op-

posing counsel in his cross-examination is not confined to matters touched upon in his direct examination but may extend the cross-examination to every issue in the case. This rule is known as the English or Orthodox Rule and was the prevailing rule throughout the United States until the year 1827 when Judge Gibson of the Pennsylvania Supreme Court stated in the case of Ellmacker v. Buckley, 16 S. N. R. 72, "That a party may not prove his case by evidence extracted on cross-examination and that a witness may not be cross-examined to facts which are wholly foreign * * * to what is already testified."

And this dictum of Judge Gibson was given highly authoritive impetus by Judge Storey, in the case of Philadelphia, etc., R. Co. v. Stimpson, 14 Pet. (U. S.) 461, where he said: "Now certainly these statements if objected to by the defendant would have been inadmissible upon two distinct grounds. First, as mere heresay; second, upon the broader principle now well established, although sometimes lost sight of in our loose practice at trials, that a party has no right to cross-examine any witness except as to facts and circumstances connected with the matters stated in the direct examination. If he wishes to examine him as to other matters, he must do so by making the witness his own and calling him as such in the subsequent progress of the cause."

Thus very largely from these two cases, has grown up the so-called American Rule which prevails in the federal courts and in many of the state courts under which rule a witness can not be questioned on cross-examination concerning any fact or circumstance not connected with the matters brought out on the examination in chief.

But even in those jurisdictions where the American Rule prevails the court has a wide discretion in controlling the latitude of the cross-examination. The Supreme

Court of the United States in Rea v. Missouri, 17 Wall. (U. S.) 532, 21 L. ed. 707.

"A greater latitude is undoubtedly allowable in the cross-examination of a party who places himself on the stand than in that of other witnesses. Still, where the cross-examination is directed to matters not inquired about in the principal examination, its course and extent is very largely subject to the control of the court in the exercise of a sound discretion; and the exercise of that discretion is not reviewable on a writ of error."

The attitude of appellate courts generally towards the American Rule is well stated in Helser v. McGrath, 52 Pa. 531.

"These rules as well as all others on the order of examination of witnesses and the introduction of testimony have for their object, the eliciting of truth and the preservation of the equality of the rights of parties in trials in courts. Much, however, must still be left to the discretion of the judge. Neither the rule nor the exception must be allowed, if it can be prevented, unduly to prejudice the parties. The exercise of a prudent discretion by the judge is the only guard against this in many cases. Although we will not reverse in this case for an excess of latitude in the cross-examination, because we do not discover the injury from it, yet we think it was very great and beyond the limits of the authorities generally. Doubtless the learned judge thought he saw the propriety of allowing it, and we can not say he was wrong, for we have not his means of judging. While no hard or fast rule can be laid down with respect to what may or may not be proper as part of a cross-examination, yet a general rule has been formulated by the courts which is ordinarily sufficient as a guide in most cases. This general rule is to the effect that the cross-examination should re-

late to the matters stated by the witness on direct examination and to the facts and circumstances connected with or related to the matters stated by him. In other words, all matters which may modify, explain, contradict, rebut, or make clearer the facts testified to in chief by the witness, may be gone into on cross-examination. Ordinarily when this field has been covered by the cross-examiner, the right, as an abstract right, to further cross-examine ceases. Beyond this, the matter of cross-examination necessarily, to a very large extent at least, must be left to the sound discretion of the trial court."

In some states, a combination of the American and English or Orthodox Rule prevails. In other states, the extent and scope of cross-examination of witnesses has been made the subject of statutory enactment while in still others, the Orthodox Rule prevails in civil cases but the American Rule in criminal cases.

In applying the American Rule, where the subject has been touched upon in the direct examination, the cross-examination may go into every phase of the subject thus opened up and will not be confined to that portion of the subject introduced in evidence on the examination in chief and where in the examination in chief, a part of a conversation has been introduced in evidence, opposing counsel on cross-examination may elicit the entire conversation, subject to the rule that parts of a conversation referring to entirely separate and distinct subjects can not be brought out. And the same rule is applied with respect to testimony given on a former trial where a portion of such testimony is introduced on the examination in chief.

But regardless of whether the American Rule or the Orthodox Rule prevails, it is firmly settled in all jurisdictions that a witness can not be impeached upon a collateral matter. Therefore, if a witness is cross-ques-

tioned concerning a collateral matter, his testimony can not be refuted as to such matter. Inquiries as to whether or not the witness has personal ill-feeling or animosity towards one of the parties to the action is not a collateral matter and may not often be denied without such an abuse of discretion as to constitute reversible error and where a witness denies his enmity or bias towards the party to the action, he may be contradicted by the testimony of other witnesses. Of course, it goes without saying that the mental caliber of the witness may be made the subject of cross-examination and he may be tested as to his memory or power of observation, since an individual whose memory is faulty is almost valueless as a witness. It is therefore competent to show the insanity of a witness or that his memory or powers of observation are otherwise enfeebled.

CHAPTER 16

THE PREJUDICED WITNESS; ONE WITH A HIDDEN PAST; FRAUDULENT REAL ESTATE DEALS, AND PRISONERS OUTSIDE OF THE COURTROOM.

There are a number of classes of witnesses whose occupation, situation or past experience tends to make them biased or prejudiced in the giving of testimony, which mental attitude the cross-examiner will do well to bear in mind, though such a witness may appear perfectly fair in his attitude on the stand. Some of these classes are to be discussed in this chapter:

The Policeman

Policemen as a class, are usually not well educated, skilled mechanically or industrious. They are men above the average in physical strength and appearance who have lacked sufficient persistence to acquire an education or learn a trade. Their contacts with the criminal element tends to make them suspicious of human nature. They are daily engaged in the prosecution of others, and of course, in defending their own acts. Their entire attention is focused upon the derelictions of mankind and not to the more noble, kindlier or more humanitarian traits. Therefore, it naturally follows that where a person is charged with a crime, the officer is naturally predisposed toward belief in his guilt. This, ofttimes, leads him to testify to things as actual facts about which he has no personal knowledge, and to state boldly that a certain thing happened, when, what he actually saw were merely circumstantial facts.

Thus, quite frequently, an officer is found testifying without qualification, that one man struck another when

a cross-examination discloses that he really saw no blow but found one of the parties bleeding apparently from the effects thereof, when he arrived. Again, he may state without qualification, that one of the parties was operating an automobile thirty-five miles per hour when what he really saw were skid marks on the pavement where the car had slid after the brakes were applied.

These and other illustrations which might be multiplied indefinitely seem to show the necessity of cross-examining police closely as to their opportunities for observing what they testify occurred. It may be further remarked that the police have a predisposition to find someone guilty and are usually dangerous witnesses for the defendant in a damage case.

A policeman's duty also tends to make him officious, dictatorial and arbitrary toward individuals and if a long time on the force, he will be so almost unconsciously. Therefore, in an issue between an officer and an individual as to what the officer did or said of this nature, the latter even if he be honest, will invariably minimize the harshness of the language he used or of his handling of the former at the time of the arrest. Policemen as a class are inclined to be vain and somewhat egotistical. They do not, however, lack in courage as their numerous encounters with the criminal element bear abundant witness. With these general characteristics of this type in the mind of the cross-examiner, the individual law enforcement officer on the witness stand should be studied carefully.

Attendants in Public Institutions

In cross-examining witnesses of this type, counsel must remember that it is quite natural for them to be loyal to their superiors and to the institutions in which

they are employed. Especially is this true of those who have been long connected therewith. As a general rule these attendants after long service become calloused to complaints of all kinds.

Inmates confined in institutions whether insane or orphan asylums or hospitals are quite likely to get in the habit of making unfounded complaints. Consequently the management and attendants view all such statements with strong reservations and suspicions and ofttimes with contempt and irritation. Unconsciously, there is built up an attitude of antagonism toward all appeals received and any one of these attendants on a witness stand is quite likely to minimize the blame or guilt of any one connected with the management who might be charged with failure to perform a duty.

Public Officials

It is unwise to attack a witness of this kind unless strong pressure can be brought to bear upon him. Before beginning such cross-examination, preliminary questions should be so framed as to impress him with the importance of his duty and the responsibility of his position and the fact that the public, the court and the jury expect him to be impartial. In a public official, the cross-examiner may look for the following tendencies:

(a) to excuse the omission of a duty;

(b) to excuse the commission of a wrongful act by a subordinate;

(c) an underground of political, religious or friendly bias.

He is there as a witness usually through the influence of some individual who does not actually appear in the case and counsel should endeavor to ferret out in his own mind who this person may be.

Witnesses Guilty of Past Misdeeds

Inquiries into the private life, or domestic infelicities, or the past misdeeds or offenses of a witness for the purpose of humiliating and disgracing him are beneath the standards of the ethical practitioner and is a practice to which he never, for a moment, should resort. Clients frequently in their hatred and venom against the adverse party bring great pressure to bear upon the lawyer to humiliate an adverse witness in every possible way. But in this situation, the cross-examiner and he alone, is charged with a responsibility which he can not shift to his clients. The lawyer, by his conduct in the courtroom, may disgrace his profession; his client can not.

Where facts are irrelevant to the issue, they must be of such a nature as to impeach the general moral character of the witness and to indicate on his part downright dishonesty, to justify a cross-examination in regard thereto. The real test which the lawyer must conscientiously apply in determining whether or not questions may be put on cross-examination which tend to disgrace the witness in this: Will the fact that this question seeks to illicit, render this witness less worthy of belief in respect to the subject-matter of his testimony? If the fact sought is one that renders the witness less worthy of belief, then the question may be properly put. If it does not and merely tends to disgrace him, counsel should resist, no matter what pressure is brought to bear upon him and refuse to pursue such a line of interrogation.

Drunkenness, adultery and facts pertaining to the relationship between the sexes, do not usually affect the veracity of witnesses, and are matters into which inquiry should not be made as a general rule. Even if the witness has been convicted of crime at some remote period and has lived down the stigma by leading an hon-

orable life thereafter, it is ordinarily inadvisable to bring this fact out on cross-examination.

In one instance an individual had, in his early life, served a term in prison for some fraudulent transaction and thereafter lived honorably; but whenever he had occasion to appear in court, either as a party to a litigation or as a witness, the question was invariably asked him, "Let's see. You have been convicted of crime, have you not?" This question almost invariably caused the witness to burst into tears and always accomplished more harm than good to the cause of the questioner.

In still another case a lawyer, early in his career, had embezzled a considerable sum of money. He was sent to prison for a term of two years and served his time. He returned to his native city and resumed his practice. Thereafter, he lived a life above reproach and became known for his honesty and integrity. Subsequently, he was appointed warden of the same prison in which he had served time. In the trial of a certain case, in which this lawyer was the defendant, the plaintiff was represented by an attorney who was a stranger in the community. When it came to the cross-examination of the defendant, plaintiff nudged his counsel and said, "Ask him if he has ever been convicted of anything?"

Counsel then put this question to the witness:

Q. "Have you ever been convicted of any crime?"

A. "Yes. Twenty-five years ago I was convicted of embezzlement and sentenced to prison. I served my time but I am at the same prison now."

Q. "What did you get in there for the second time?"

A. "Well, I got in the second time because I was living a fairly decent and respectable life since I returned and five years ago the governor of this state saw fit to

appoint me warden of that prison which position I have since held."

A wonderfully effective cross-examination, but for the defendant and not the plaintiff!

When the situation arises where exposing past misdeeds of a witness is justified, the task is still, nevertheless, a delicate one and may be easily bungled. Juries are quick to sympathize with one who is obliged to confess his crime from the witness stand and it is highly advantageous to the cross-examiner if he can plan his approach to the subject so that the witness will lie about his previous conviction or misdeed. If he is then forced to admit the offense after a previous denial he will receive no sympathy from the jury and will be utterly discredited. For this purpose do not approach the witness with any question tending to suggest knowledge of his past guilt, but rather by implication, convey the opposite impression. He will more readily fall into the trap if one waits until near the close of the cross-examination before taking up questions as to credit. He will naturally assume that if knowledge of his conviction was had it would be brought in the beginning. Ethically such a course of entrapment is justified only in case counsel has reason to believe that the witness has testified falsely, and not in the case of an otherwise honest and truthful witness.

All that has been said herein in regard to the propriety of exposing past offenses or misdeeds, does not apply when facing the plaintiff in a slander or libel suit. In an action of this kind, the character and reputation of the plaintiff are directly an issue, and what others say about him are relevant to the issue. Here, counsel must proceed with great caution and under no circumstances throw out by the implication the inference that the

plaintiff has been guilty of a great deal of misconduct, the truth of which the cross-examiner is not in a position to prove. This statement applies with considerable force where the plaintiff is a man, but where the plaintiff is a woman, it applies with double force. Where a woman is suing for libel or slander and upon cross-examination counsel for the defendant attempts by his questions to blacken her reputation, he is quite likely to increase the size of the verdict by many fold if he fizzles out in his proof. Unless he can show clearly and satisfactorily beyond a peradventure of a doubt that the female plaintiff is a woman of thoroughly bad reputation, he had better avoid as he would a pestilence, assailing her character by his cross-examination under such circumstances. Just as sure as the defendant attacks the character of the plaintiff, just that certain he is to magnify the damages she will receive, unless, as stated before, he is in position to prove that the reputation of the plaintiff is bad beyond any question.

In a case tried in the circuit court at Detroit many years ago, during the first trial thereof counsel carefully avoided casting any aspersions on the character of the plaintiff by his cross-examination or otherwise. A modest verdict for the plaintiff resulted. A retrial was secured and counsel then made the mistake of assailing her character from every possible angle. This time the amount of the previous verdict was more than doubled. The case was appealed to the Supreme Court and sent back for a third trial and this time counsel scrupulously avoided assailing the plaintiff's character in any manner. This time the verdict was $200 less than that obtained in the first trial.

In another case, the plaintiff Myrtle F., a rather attractive young girl, nineteen years of age, brought suit for slander against a well-known physician of Detroit

because he had circulated the report that this girl had used certain vile and unspeakable language to him at a given time and place. The case came on for trial. The attorneys defended on the ground that the doctor had made a serious mistake in circulating this report; that he did it only because it was necessary to convince his wife that he did not hold the girl in very high esteem. No serious contention was made that the girl had actually used the language ascribed to her by the doctor in this alleged slanderous utterances. The jury returned a verdict for one thousand dollars. Because of error in the record, defendant secured a new trial. Other counsel were employed and the character of the plaintiff was vigorously assailed. The proof defendant brought forward on this occasion fell short of actually showing that plaintiff's reputation was really bad. The result of the second trial was a verdict double the amount awarded in the first.

Fraudulent Real Estate Transactions

A large volume of litigation reaches our courts annually over alleged fraudulent misrepresentations in real estate transactions. This, in most states, takes the form of actions for rescission of contract by the purchaser or actions for damages by such purchasers. The suit is usually grounded on one or more of the following classes of representations:

(a) As to the income involved.

(b) As to the value of the property or what the seller paid for it.

(c) As to the cost of heating the building, particularly as to large apartment buildings.

(d) As to the dimensions or boundaries of a parcel of real estate.

(e) As to the character of soil in farm lands and productivity thereof.

(f) As to encumbrances on the property.

(h) As to the condition of the buildings.

The first problem that confronts the lawyer for the plaintiff in such a trial is to establish, beyond any cavil, the inadequacy of the consideration which the plaintiff received. In other words, its solution is to show that plaintiff has actually received less than he gave or contracted to give, and in so doing no effort should be spared. The courts will look for a reason to set aside the transaction if this is shown, but where the question as to whether or not the plaintiff was actually defrauded is itself a doubtful one, as well as whether or not the alleged statements in dispute were actually made, there is little hope of success." Ex-Justice Moore who for many years was a prominent and highly regarded member of the Michigan Supreme Court, once made the following statement, apropos of this question.

"When a case comes before us (The Michigan Supreme Court), we first examine the record to see if practical justice was had in the lower court. If we reach the conclusion that substantial justice was rendered in the lower court, we then look for reasons to affirm the judgment of that court. If, on the other hand, we reach the conclusion that an injustice was done in the lower court, we then look for reasons to reverse the case."

Assuming, therefore, that counsel for the plaintiff has produced abundant evidence in the case to establish the fact that his client has been clearly overreached in the transaction, a cross-examination of the defendant and his witnesses should be directed towards securing an admission of this fact. If the defendant admits that the plaintiff was overreached and that there is a considerable disparity between the price paid and the actual value of the

property, more than half the battle has been achieved. If he refuses to make this admission, which usually occurs, one of the objectives of the cross-examiner should be to make him go just as far in exaggerating the value, as possible. If plaintiff's proof as to the value is as strong as it should be, the giving of an exaggerated value by the defendant will be highly damaging to his cause. Here it will usually appear that the defendant was possessed of complete information as to those features of the property which the plaintiff claims was misrepresented. It will also usually appear that the defendant had this information and the plaintiff did not and as to each alleged misrepresentation, this situation should be brought out and emphasized. Counsel for the defendant, in cross-examining the plaintiff and his witnesses, should endeavor to bring out all those features of the claimed misrepresentation which the plaintiff could have ascertained by the use of his senses. This will include condition of the building and other visible features of the property.

Prisoners Outside of the Courtroom

Law enforcement officers, in every community throughout the United States, are compelled, daily, to interrogate those suspected of crime. While this form of interrogation is not, strictly speaking, a cross-examination, it nevertheless is, in all its essentials, governed by the same psychological laws. After all, human nature is the same both in and out of the courtroom. Such inquisitions on the part of police authorities possess some advantages not enjoyed by the lawyer, and some disadvantages. True, in the first place, the suspected criminal need not there answer any questions at all, unless he chooses to, while in the trial of a case, the court will compel him to reply to those pertinent, or he will be ad-

judged in contempt and punished accordingly. Quite frequently, the experienced criminal will refuse to answer anything whatever, and then of course, cross-examination is out of the question.

The prosecuting officer has, in another respect, a very decided advantage over the cross-examiner in court in that he is frequently able to incarcerate the suspected person in communicado, leaving him without means of knowing whether or not his associates have made damaging admissions as to his guilt. If a suspect declines to talk at all, then, of course, that is in itself a strong indication that he is not innocent. Nevertheless, this discussion will not be applicable to such persons but will be confined to the assumption that the individual in custody will reply to questions. This is usually the case. In previous discussions in this work, the "sledge hammer" method of trying to force the truth in court trials has been condemned. However the detective, in quizzing a suspect seldom uses any other method. While the lawyer himself recognizes very clearly the immense value of suggestion in eliciting from witnesses, confessions of guilt, the suggestions should not be made until strong incriminating circumstances have been secured. Far better would it be for the officer to pursue a respectful and courteous attitude toward a prisoner and in this manner secure his confidence and thereby induce him to talk, than to start his inquiry by an attempt to "bulldoze" him into a confession of guilt. Very often this course causes the latter to close up and the officer thereby loses every chance of securing a confession or even a damaging admission.

In one instance a prisoner had been held for two days, accused of a burglary. He was young in appearance, little more than a boy, but in spite of the fact that the police had used the "brow-beating" or "sledge ham-

mer'' method on him, accusing him of the crime with the greatest persistence, he steadfastly denied his guilt. Threats to beat him were freely made by those in charge. One brawny sergeant thrust a formidable fist in his face and said ''Say kid, if you don't come clean and tell us you did that, you'll get a taste of this.'' All of which availed nothing. An attorney was called in and asked that the suspected criminal be left alone with him. The prisoner was then interrogated about many immaterial things, his ancestry, where he had worked, etc., in a courteous and respectful manner. He soon responded readily to the lawyer's friendly attitude and talked freely. This interview lasted some fifteen or twenty minutes, and the statements he had made were checked up and they were all found to be false. At the second interview, he was confronted with their falsity and then, for the first time, it was suggested that without doubt, he was the perpetrator of the burglary. Inside of thirty minutes, he had made a complete confession.

Indeed, the ''brow-beating'' or ''sledge hammer'' method of interrogating a suspected person is rarely productive of any actual results if resorted to at the outset of the inquisition. There comes a time, however, when it may be used with effect after a considerable body of incriminating facts has been secured and after more adroit methods have failed. It is always well to convey to the ''suspect'' the suggestion that a lot is known about the case and about his connection with it that the detective or prosecutor conducting the examination will not disclose and great care should be exercised at all times that the cross-examiner make no statement as to how the crime was committed or any details about it concerning which he is absolutely not sure. The very moment the latter makes a statement to the person suspected of crime which such person knows to be false,

the suspect at once discredits all else the officer is telling him about his information as to the crime.

We make the following concrete suggestions for the examination of those suspected of crime:

1. That in every instance, the suspected person should be interrogated courteously and the suggestion may, ofttimes, be profitably left with him that the officer does not believe him to be the guilty party at all. There is abundant time for "sledge hammer" methods later on, if they become necessary.
2. That a complete story should be secured from the suspected person regarding where he works, lives and his movements in detail, at or about the time the crime was committed. This must be then carefully checked.
3. After the record of the witness, including what he says about his movements at or about the time the crime was committed, have been checked, the officer is then in position to know whether or not he has made false statements. If so, this is strong evidence that he is trying to hide something.
4. It is only in subsequent interviews, when considerable discrepancies have been uncovered in his story, that the suggestion should be made that he is the guilty party. Even then, the advisability of doing this in a disrespectful manner is doubtful.
5. Where a number of incriminating circumstances are in the possession of the authorities and a statement given by the prisoner has been checked and found to be false, an officer should not communicate to him all of his information at one interview. The sounder practice is to refer to one incriminating fact at a time, always leaving the impression that a great deal more is known than the officer is willing to communicate and as the

damaging bits of evidence are fired at the suspect, he will always be kept guessing as to just how much more the officer may know that he has not yet communicated.

6. The officer should talk with the suspect about general subjects a sufficient length of time to acquire some estimate as to his mental capabilities. A large percentage of criminals have not developed beyond the stage of morons. If the criminal is of this mental caliber, he will require far different handling than one more intelligent.
7. It is sound policy for an officer to be as friendly with the suspect as possible. Human nature will respond to this sort of an attitude very readily, where "brow-beating" will fail.
8. After considerable incriminating evidence has been secured and the suspected person's story thoroughly checked up, it may then be advisable to forcefully and repeatedly suggest to the suspect, that he is guilty, that the officer knows that he is guilty and that there can be no possible question about his guilt. This can and should be done courteously and respectfully and will have much more suggestive force than calling the accused a "rat," a "scoundrel" or a "blackleg." Such epithets always arouse natural resentment and increase resistance against the interrogator.

The suspect should be questioned, bearing in mind certain well settled facts of human experience. These facts, briefly summarized, are:

(a) That in a physical encounter, the stronger individual is usually the aggressor, therefore, the sex, age and physical ability of the individual should be taken into account in order to determine who was the stronger.

(b) An individual who is the aggressor in a fight or an assault, especially if he has reached maturity, will almost invariably have a record back of him of repeated assaults or fights. A man who has reached the age of twenty-five will rarely engage in a personal combat with another, unless he is forced into it or unless the provocation is exceedingly strong.

(c) Men rarely become criminals after they have attained the age of twenty-five years unless through alcoholism or drug addiction or by reason of embezzlement of funds, which latter crime may occur at any period of an individual's life. If the accused is over the age of twenty-five years, a searching investigation of his record should be made which will almost invariably disclose past convictions, if he is actually guilty of the crime charged.

Can be asked as to compensation -
State v Campbell (1931)
239 NW 715: 725
Buttman v Christy (1924)
197 Iowa 661 · 669 -

CHAPTER 17 [But]

THE EXPERT WITNESS

Read also Wellman Art of Cross-X - p 76

The Medical Expert

The medical expert, other than the alienist or psychiatrist, is called to the witness stand most frequently, in personal injury cases.

"Never cross-examine an expert in his own field" is a familiar admonition to most experienced lawyers. This caution should be qualified and made to read "Never cross-examine an expert in his own field, if he actually is such in that particular field and if his conclusions, as given from the witness stand, are sound." If he is an expert, and by that is meant, if he thoroughly is grounded in his specialty, but his conclusions in the matter in hand are unsound, then by all means, test him concerning these conclusions and his basis for them. But, before the lawyer should attempt this, he must necessarily thoroughly inform himself on the subject to be so covered. If it be some disease of or injury to the ear, the anatomy of this organ should be studied closely as well as those diseases which may be made the subject of discussion in connection therewith. If the injury is claimed as one that affects the heart, a similar course must be pursued with respect to that organ. If the defense is going to be that your client is suffering from some disease instead of the injury you claim, that disease must be gone into thoroughly. It is also well to discuss the matter with some well-informed physician in addition to text-book research. At all times, avoid an aimless and rambling cross-questioning without a definite

objective, which can only result in strengthening the testimony given on direct examination.

If you determine that the doctor has told the whole truth fairly and impartially, which will seldom be the case, then, what little cross-examination you give him should be directed, not to the medical aspects of his case at all, but to other facts which may weaken his testimony. Thus, for example: If he is a youthful practitioner, bring that out. If the injury or disease is an unusual one, ask him when he treated a similar case and gradually feeling your way, you may drive him to the admission that he has not treated a similar case in his entire practice. Even if he happens to be a doctor of long experience, his practice may have run along lines entirely alien to the subject upon which he is testifying.

One is perfectly safe in probing thoroughly as to an expert's experience and the class of cases he has been handling because, whatever he says about it will not bear directly upon the facts then being tried and can do no material damage. If you find him exaggerating the effects of the injury, when he is called for the plaintiff or in case he is minimizing such effects, when called by the defendant, in both instances, he should be interrogated in such a manner as to expose to the jury his deviation from the facts. In nearly every instance of this kind, the testimony will revolve around the permanency of the injuries and here again, one finds himself in the domain of conjecture and guess-work.

In some cases, it would be the safer practice to ascertain from the doctor when he treated a similar case and what sort of a recovery the patient made and what the patient is then doing; feeling one's way carefully so that it will be possible to back away from the subject in case it becomes apparent that the doctor has treated many similar cases and can readily give the benefit of

his experience. It may ofttimes be discovered by following through some of the patients which the doctor states he had treated for a similar injury, which he declares to be permanent, that the patient is engaged in some occupation involving heavy manual labor, which of itself completely belies the testimony that such patient was permanently injured. Occasionally, the medical expert is a "false alarm" and is not well grounded in his own special field. He may have won considerable notoriety by means of clever advertising, but is not actually possessed of much scientific knowledge. The cross-examiner must determine, in advance, whether or not the witness is of this type.

A striking example of a doctor, who was not qualified as an expert, occurred a few years ago in an action for damages. Plaintiff, who may be called James Barnes, had brought suit against a city railway, for personal injuries. Plaintiff averred that, while alighting from a street-car, it was prematurely started, throwing him to the pavement and that the resulting shock had caused him a nervous breakdown and permanent injuries to his right knee which had become considerably swollen and had remained so ever since, and that he had gone into a mental decline which had ruined his business. His position was supported by several medical experts. The defense was that plaintiff was suffering from the initial stages of paresis, in other words, syphilis in its tertiary state. It became necessary for counsel for the plaintiff to study the disease of syphilis with the greatest possible care, as it was apparent before the trial, what the defense would be.

The first one of defendant's experts to be called to the stand was a Dr. B., a very impressive looking gentleman. He testified, on direct examination, that he had graduated from one of the leading medical colleges of

the country and had taken post-graduate work in Vienna; that he was superintendent and in charge of one of the very largest hospitals in the city. Plaintiff then continued his direct examination with the following:

Q. "Have you made an examination of James A. Barnes?"

A. "Yes, sir."

Q. "What did you find him to be suffering from, if anything?"

A. "He was suffering from syphilis in the tertiary stage."

Q. "Just what do you mean by the tertiary stage?"

A. "That is the third stage of syphilis, where it attacks the nervous system and eventually results in paresis. It is really the initial stage of paresis."

Q. "What were the symptoms you noted in James A. Barnes which lead you to this conclusion?"

A. "Well, first of all, I noticed that his nerve centers did not respond readily to stimuli. His thought processes were slow. For example, he did not answer questions which a normal man should with promptitude and dispatch. This is characteristic of paresis in the early stages."

Q. "What else, doctor?"

A. "Secondly, I noticed a fibril tremolo of his tongue. This is also characteristic of syphilis in this stage."

Q. "What else did you notice, doctor?"

A. "In the next place, my attention was called to the condition of the plaintiff's knee. The knee was greatly swollen and presented a typical case of Charcot joint. This is an unfailing indication of syphilis in its last or third state."

Q. "Just what is the Charcot joint, doctor?"

A. "The Charcot joint is a swelling of the knees and

was discovered by the great French doctor, Charcot, who found, by exhaustive investigations covering thousands of cases, that a Charcot joint was always accompanied by syphilis. After the researches of Charcot, the medical profession, by additional research, has confirmed the discovery of Charcot, so that now, the Charcot joint is accepted the world over, in the medical profession, as an unfailing symptom of syphilis."

Q. "What else did you discover, if anything, in the condition of James A. Barnes, which leads you to conclude that he was suffering from paresis?"

A. "I noted that he had what I believe will ultimately be an Argyle-Robertson eye. He did not, as yet, have the Argyle-Robertson eye, but inside of a year, at most, I believe that he will certainly have it. This eye is also characteristic of paresis."

The doctor had given his testimony in a pleasant and well modulated tone of voice and had made a fine impression on the jury. As an expert on paresis and syphilis, he had scored heavily.

Cross-examined as follows:

Q. (Counsel, in a courteous and respectful manner.) "While you were in medical school, doctor, did you make any special study of paresis or syphilis?"

A. "No, nothing more than we did all other diseases."

Q. "How long have you been superintendent of X hospital?"

A. "Fifteen years."

Q. "What are your duties in connection with that hospital?"

A. "My duties are to generally supervise the work going on in the hospital.

Q. "How many beds are there in that hospital?"

A. "About one thousand."

Q. "The actual work of treating and prescribing for the patients in that hospital are in charge of other physicians and surgeons?"

A. "Yes, sir."

Q. "Do you do any actual work there of a medical or surgical nature?"

A. "Yes, I quite frequently do surgical work."

Q. "But this work has nothing whatever to do with paresis or syphilis?"

A. "No sir."

Q. (Feeling his way now.) "Doctor how long has it been since you treated your last case of syphilis?"

A. "Oh, I couldn't say."

Q. (Counsel taking advantage of the apparent opening and feeling his way.) "Doctor has it been within the past year that you treated a case of syphilis?"

A. "Oh, I couldn't say, but I don't think so."

Q. (Counsel, going a step farther.) "Doctor, would you say positively that you have treated a case of syphilis within the past five years?"

A. (Doctor showing traces of embarrassment.) "Oh, I would not be sure about that. I would not want to say."

Q. (Counsel, pressing the advantage.) "Doctor, would you positively say that you have treated a single case of syphilis within the past ten years?"

A. "No, really, I would not want to say."

Q. "Then, doctor, you will not tell us positively that you have treated a single case of syphilis within the past ten years?"

A. "No, sir."

Q. "You do not claim to be an expert, at all, on the subject of syphilis?"

A. "No, sir."

Q. "Now, doctor, the first thing you say that you

know about James A. Barnes, as indicating that he had paresis, was the fact that his thought processes were slow?''

A. ''Yes, sir.''

Q. ''Can you tell me quickly, approximately how long it has been since you treated your last case of syphilis?''

A. (The doctor shuffled uneasily in his seat. The courtroom became silent. The doctor, after a few minutes of hesitation, answered:) ''Well, really I haven't any idea.''

Q. ''You did not answer readily Doctor. You hesitated. Are your thought processes likewise slow?''

A. ''They may be.''

Q. ''Does that fact, standing alone, indicate syphilis?''

A. ''I do not think so.''

Q. ''The next thing that you noticed about James A. Barnes that indicated syphilis, was the fibril tremolo of the tongue?''

A. ''Yes, sir.''

Q. ''In plain English, doctor, you mean by that that he was nervous and his tongue shook?''

A. ''Yes, sir.''

Q. ''You required him to open his mouth?''

A. ''Yes, sir.''

Q. ''And there were three other doctors standing about him?''

A. ''Yes, sir.''

Q. ''Would not such an ordeal tend to make most any man nervous?''

A. ''Well, it might.''

Q. ''So that Barnes' nervousness was nothing more than to be expected under the circumstances?''

A. ''Yes, sir.''

Q. ''The third symptom which you discovered, was

the Charcot joint. You found here a knee joint considerably swollen up?''

A. ''Yes, sir.''

Q. ''What you term a Charcot joint, is a swollen joint of the knee?''

A. ''Yes, sir.''

Q. ''An injury to the knee sometimes causes a swelling of the joint?''

A. ''Yes, sir.''

Q. ''And an injury to the knee might cause a joint to swell as you found the joint of James A. Barnes?''

A. ''It could.''

Q. ''And if an injury could cause the swelling, as you saw it, on James A. Barnes, you, yourself, have no means of knowing whether or not the condition you found was a result of an injury or not?''

A. ''No, not of my own knowledge.''

Q. ''Mr. Barnes did not have an Argyle-Robertson eye at the time you examined him?''

A. ''No, sir.''

Q. ''It was only your guess that it might later become one?''

A. ''Yes.''

Q. ''You did not care to say that James H. Barnes had syphilis from the appearance of his eye alone?''

A. ''Oh, by no means.''

Q. ''Now, doctor, you have demonstrated, in one instance at least, that your thought processes were slow. You have also demonstrated that you are somewhat nervous, which are two out of the three symptoms of syphilis, which you claim James A. Barnes had at the time you examined him. Will you state to the jury whether or not, in your opinion, you, yourself, have syphilis?''

A. "I would not be positive. No one in these days can tell."

The doctor left the stand far from the smiling witness that he was when he took it.

The following cross-examination by Frederic T. Harward, of the Detroit Bar, is a forceful illustration of the importance of medical and anatomical preparedness on the part of the counsel and the disastrous effects of unpreparedness on the part of the witness.

A woman had sued the Detroit United Railway for injuries to her ear. Her physician was a doctor of little education, who started to practice before the statutes provided, so rigidly, the qualifications a physician must possess to enter the practice of his profession in Michigan. Counsel had set up nearly all the preceding night, reading medical text-books on the structure of the ear, and was pretty well posted. The doctor came in wearing a silk hat and frock coat. He testified, on direct examination, impressively. His cross-examination follows:

Q. "You treat the eyes and ears?"

A. "Yes, nose and throat."

Q. "Where is your office?"

A. "———————— Avenue."

Q. "You have been talking about the inner ear and hypernemia?"

A. "I am treating the middle ear separate."

Q. "When you get by the ear drum, in the middle ear, there are some bones?"

A. "Yes."

Q. "How many."

A. "Three bones, there are three bones."

Q. "Then you come to the inner ear?"

A. "Yes."

Q. "How is that separated from the middle ear?"

A. "By a division."

Q. "Of course, but what is the division?"

A. "From the back part of the drum."

Q. "Is it separated by membrane or bone?"

A. "Membrane and bone both."

Q. "How many openings are there in there, in that?"

A. "Three openings, there is the vestibule and the canals."

Q. "That is the manner in which the inner ear is separated from the middle ear. What separates the middle ear from the inner ear?"

A. "A bony ring."

Q. "How many holes are there in that?"

A. "Three of them."

Q. "How many holes do you say?"

A. "I can't say. I can't answer that."

Q. "Can't you tell us that doctor?"

A. "You are trying to slur my graduation and things like that. It is as good as yours. I have answered your questions, all there is to be answered."

Q. "Well, how many holes are there in the wall between the middle and the inner ear?"

A. "Three."

Q. "What are their names?"

A. "I don't know."

Q. "Is it stapes or hammer?"

A. "I was laid up, I could not spend any time in this. I have been sick. You could not answer any questions in your law if you did not look them up. I can answer them all right. I know all about it. Your honor, this young man is trying to injure me in my profession. I know all about it. I can tell it."

Q. "Well then, tell us, doctor. I am not trying to injure you. I want to get the facts. There is a bony ring there?"

A. "Yes."

Q. "Which one of the bones is up against the wall? Which one of these bones is pressed up against the bony wall between the middle ear and the inner ear? Which one of these bones, in other words, connects with the auditory nerve?"

A. "I think it is the hammer."

Q. "Don't you know that the hammer is connected with the ear drum?"

A. "All three of them is connected with the drum."

Q. "Which hole does the auditory nerve go through?"

A. "Which hole?"

Q. "There are three holes, you say, have you forgotten, which hole the auditory nerve comes out of?"

(About this time, he was in a great perspiration.)

A. "It comes in the inner ear."

Q. "But how does it get in there?"

A. "Through a perforation."

Q. "How does it connect with the inner ear and the drum?"

A. "The drum—there is sound by the waving of the bone."

Q. "Which bone is up against the partition?"

A. "I don't know the name now."

(The sweat was now dropping profusely from the doctor's face.)

Q. "Isn't the auditory nerve up against one of these bones, to carry sound?"

A. "It may be. I don't know now."

Q. "That is all."

A. "I could tell you in two minutes, if I had time outside."

Q. "Well, that's all, doctor."

When the cross-examiner said "that's all" the learned gentleman grabbed his silk hat and left the courtroom,

with such speed that the tails of his frock coat stuck straight out behind.

Where the medical expert is voluble and talkative and the cross-examiner makes up his mind that he will likely go any length to sustain the position of the party calling him, counsel can ofttimes thoroughly discredit such a witness by making up a list, partly genuine and partly fictitious, of diseases or of medical authorities or of the names of various kinds of fractures which may be used with deadly effect on witnesses of this kind. This list should be begun with well-known and genuine terminology, passing to the fictitious terms well down the list.

A striking illustration of the efficacy of this method occurred in the famous Greeson murder trial, in Detroit, a few years ago. Lillian Greeson, wife of Michael Greeson, was found in bed unconscious, with her throat cut from ear to ear and her skull badly fractured. Her husband, a few days before had insured her life heavily. At the trial of the defendant for the murder of his wife, it was the position of the prosecution that the deceased had met her death partly through the fracture of her skull by some blunt instrument and the question of various kinds of fractures and how they might be produced became an issue in the case.

The defense called to the witness stand a Doctor J. B., who as to the fracture testified that it could not have been made by a blunt instrument and was more likely produced by a fall, which coincided with the theory of the defense. He was very voluble and apparently would go most any length to support the contentions of the defense in the case. Robert Speed, the assistant prosecuting attorney, who was trying the case for the People, decided, during the recess hour, that he would set down a list of names of fictitious types of fractures along with some genuine names of fractures and see whether or not

the doctor would take the bait and profess knowledge of them all. While the prosecutor was at the table, he saw an acquaintance of his, Captain Dennison and he put down the word "Dennison." Unconsciously to while away the time during which the jury was being impanelled, he had drawn on his pad, the picture of a mouse. This drawing attracted his attention so he included the word "mouse" in his list. Consequently when his list of fractures was completed, it included the following:

Morris fracture—genuine.
Barton fracture—genuine.
Smith fracture—genuine.
Wing-stif fracture—genuine.
Butterfly fracture—genuine.
Dennison fracture—fictitious.
Mouse fracture—fictitious.

His cross-examination of the learned doctor then proceeded:

Q. "I suppose doctor, you have heard of the Morris fracture. If so, will you please describe it?"

A. "A Morris fracture is an old term used by any practitioner. We don't use that any more. In all modern text-books, you can not find it."

Q. "You don't know what it is?"

A. "No modern text-book has it."

Q. "You have heard of a Barton fracture have you not, doctor?"

A. "Yes, I have heard of a Barton fracture, but it never happens in the head. It is a fracture of the extremities, usually of the legs or arms. A Barton fracture is often found in the upper extremities, that is the upper arm, but never in the head."

Q. "Will you please describe what is meant by a Smith fracture?"

A. "You must have got that in 1880. That term is now obsolete. We don't use it any more."

Q. "I presume you are familiar with the Wing-stif fracture?"

A. "Yes, sir. By the Wing-stif fracture is meant—that is another name used to name them after the name of the man that mentioned it. That was the name of the man. If you give me the name of the modern one, I will tell you."

Q. "I presume, doctor, that you can describe a Butterfly fracture?"

A. "Yes. This is another one you don't find in the head. You must have found the wrong one."

Q. "I am talking about fractures in any part of the body and not skull fractures, don't forget that."

A. "All right. A Butterfly fracture is one that has a Distal fracture of the bone."

Q. "I suppose also, doctor that you are familiar with the Dennison fracture?"

A. "A Dennison fracture is the name of another man—who found this fracture and so designated it. We don't put that in modern text-books."

Q. "You have never known of a case of Dennison fracture?"

A. "I know that he is the name of the man that named the fracture after himself. If you will give me the name of the new term, I will tell you."

THE COURT: "Can't you answer?"

A. "I can't answer anything."

THE COURT: "Can't you answer 'yes' or 'no' whether or not you know?"

A. "No, I don't know."

Q. "What is a Mouse fracture?"

A. "A Mouse fracture is one named in 1880 by some man who found the fracture. It was a very odd thing.

It resembles a mouse. As a rule, a fracture follows certain lines, but they have unusual lines because they do have the shape of animals."

Q. "Did you ever read in any medical book about a Mouse fracture?"

A. "Yes, sir. That is an old thing and I am very familiar with that. It has been named that way by reason of the appearance of the fracture."

When counsel finally confronted witness with the fact that he had drawn the terms "Dennison fracture" and "Mouse fracture," from his imagination, and there was no such thing, the doctor spent about twenty minutes with his own counsel, trying to explain why he got into this trap but in the end, he left the witness stand thoroughly discredited.

Where the evidence is of such a nature that the expert is in possession of knowledge and experience which may tend to support the theory of counsel's case, a judicious cross-examination may bring out scientific facts or information which will tend to minimize the opinion given on direct examination. And finally, in the cross-examination of a medical or any other expert, the question should be so framed as to confine a witness to narrow limits in an answer. If the question is broad enough to permit the expert to expound his own views or deliver a lecture on the subject, great harm may result to the cross-examiner's cause.

Psychiatrists and Alienists

The cross-examination of psychiatrists or alienists who are, in plain words, insanity experts, is sometimes a most difficult task. Here the attorney is dealing with men who are not only keen mentally but, in addition, are usually thoroughly prepared by experience for the witness stand. They know precisely how to tell a half-truth

in a way that will make it sound for all the world like the entire truth; how to evade a damaging question with all the appearance of having answered it fairly; when and how to be modest or even diffident; when it will serve their purpose to register indignation, and where such a course will aid the cause of their clients. They are, in short, no mean antagonists for any lawyer to meet. In the interrogation of this class of witnesses, counsel, if the expert knows his subject thoroughly and his conclusions are sound as given, in other words, if he is telling the truth, had better content himself with showing the probable size of the fee which he will receive for his testimony, the important fact that he has never seen the individual about whom he is testifying and the frequency of his appearance in court as a witness, and let it go at that. Nearly every expert is vulnerable on one or all of these points. If he admits that he has never seen the subject concerning whom he is testifying, he should be then interrogated as to the importance of personal observation in forming conclusions as to the nature of the patient's ailments. He should be forced to admit that he would never think of treating a patient or making a diagnosis of his case without seeing him. The analogy between his testimony and the treating of the patients by mail should be forced from him or at least indicated. All this can not fail to have a good effect upon the jury. Too, in some of our larger centers of population, certain so-called experts spend fully one-half of their time testifying in court. These are not in any proper sense professional psychiatrists or medical men but are actually professional witnesses and if this fact is brought out, it will be damaging to their testimony. All of the foregoing remarks apply to the witness who is reasonably truthful and fairly sound in his conclusions.

The expert whose testimony possesses neither one of these merits, however, for example in will contests, usually bases his conclusions upon hypothetical questions. These hypothetical questions must be grounded on the testimony already given in the case and must not contain any statement of assumed facts or circumstances not already in evidence. The cross-examiner first of all then should be on the alert to see that the hypothetical question submitted contains nothing but facts already in evidence in the case. The better practice with respect to the hypothetical question and one which counsel has the right to insist upon in most jurisdictions, is that it be prepared and submitted to counsel for approval before being propounded to the witness. This is especially the case where the question is long, requiring let us say, more than three minutes to state. It may be assumed from the outset that the hypothetical question put to the expert for the contestants in a will case, will present no testimony tending to show the sanity or normality of the testator. Here it is sound for the cross-examiner to interrogate the expert concerning those qualities possessed by the testator which tends to indicate his sanity. In this connection, it must be kept in mind that even a person who is actually insane may often display the qualities of normalcy; that even as to such a person, many witnesses might be called who had talked with him and discussed various subjects with him and who noticed no insanity or eccentricities. It is, therefore, good practice for the cross-examiner to proceed to prepare the jury for the testimony which is to follow by interrogating the expert as to whether or not he knew the testator possessed these various characteristics; if the testator attended to his business or any part of it, or executed legal documents, or if no one had ever accused him of being insane during his lifetime. The expert should be quizzed about

each one of these facts and whether or not he knew that such was the case and had taken these facts into consideration in giving his opinion. The following is an example of how this may be accomplished.

A lady fifty-five years old, on May 15, 1923, began muttering and talking to herself a great deal, expressing the fear that certain organizations were intending to harm her. She gradually grew violent, until on or about the first day of July of the same year, she was adjudged insane and placed in a hospital. During the interim, when the first signs of depravity began to appear, she exhibited certain mental derangements, such as ordering some of her friends who had called to see her, from her home; expressing dread that the Catholic church had a particular grudge against her and was seeking to destroy her, and other abnormal mental traits.

After her death and the probate of her will executed some two weeks after she had begun to show said signs of mental derangements, the attorney for the contestants unquestionably if he knew his business, should have compiled all of these abnormal mental actions of the deceased into a single statement of fact and asked the expert witness whether or not in his opinion from such assumed statement of facts, the testatrix was sane or insane, and had the mental capacity to make the will in question. This, of course, would be answered in the negative. An effective cross-examination under the circumstances, would develop all of the conduct of this woman tending to indicate sanity and normalcy. The following cross-examination of Dr. C. may serve as an example.

Q. "Now, doctor, you say that upon the assumed statement of facts just read to you, that this woman on the date the will was made lacked testamentary capacity?"

A. "Yes, sir."

Q. "Did you know that she was working every day in her home?"

A. "The question does not state whether she had or not."

Q. "And that she cooked the meals for her husband and waited upon him in her usual and customary manner and that she prepared her children for school each and every day and that most of her friends and acquaintances did not notice anything abnormal about her mental condition?"

A. "The question does not cover such facts."

Q. "Now, doctor, if she got her children ready each morning and sent them to school, she would on that date, know who her children were, would she not?"

A. "Yes, sir."

Q. "And if she cooked the meals for her husband she would know who he was?"

A. "Yes, sir."

Q. "As to the husband and children, she would know what she wanted to give them for their meals?"

A. "I think she would."

Q. "And when she made the will she would know who her husband and her children were and what she wanted to give them (they were beneficiaries under the will of her property)?"

A. "I think she would."

The answer to this last question was, of course, practically an admission of testimentary capacity by the expert and rendered his opinion almost valueless to the contestants.

Here is another case recently tried in the courts of one of our large cities where the children were contesting the will of their mother. She had practically disinherited all of them and it was the claim of the children that she did so by reason of insane delusions in regard

to them which influenced her. One of the best known alienists in the middle west was called to the stand for the contestants who testified impressively on direct examination that this mother had made her will under the influence of various insane delusions with respect to her children and that she was not mentally competent at the time. This alienist was a man of very broad court experience and usually handled himself with great ability on the witness stand. The cross-examination follows:

Q. "What would you say doctor, as to the condition of this woman's memory on the day she made this will?"

A. "I would think that her memory was probably good. I would think that she might be normal along many other lines except those relating to her children."

Q. "What would you say as to whether or not she would be able to enter into a contract, say a land contract and know what she was doing."

A. "Of course, I do not know, but I think that she would be able to enter into a land contract and know what she had done."

Q. "Would she also know on the date in question what sort of property she possessed, that is to say, different kinds of property, amounts and values?"

A. "There is no doubt but what she would know what property she possessed at that time. She would also know its value."

Q. "State whether or not she would know, in your opinion, doctor, as to whether or not she had diamonds, precious stones and how many of them and how much money she had in the different banks."

A. "I think she would."

Q. "She had been able on the day that she made this will to travel around the city unattended and know acquaintances as she met them on the street. State whether she would have been able to do this."

A. "Yes, I think that she would be able to do this."

Q. "I suppose that she would be able to go down to the store and make purchases, would she not?"

A. "I presume she would."

Q. "And when she was doing any particular act, state whether she would know, in her own mind, whether she was doing that particular thing?"

A. "She would know what she was doing."

Q. "State whether or not when she got down to the making of this will on November 10th, 1913, she knew that she was engaged in making a will?"

A. "I have no doubt that she had sufficient mental faculties to know that she was making a will on that date."

Q. "Would she know who her children were on the date in question and the relative situation of each?"

A. "I suppose that there is no doubt that she had mental faculties enough to know who her children were and the relative situation of each."

Q. "Would she on that date, know just exactly what she wanted to do with reference to these particular children, that is, how much she wanted to give them in her will?"

A. "I think she would know just what sums she wanted to give them. I know she knew it as she put it in the will that way and I presume she knew what she was doing if she put it in the will that way."

Q. "Then, will you state whether or not this woman had testamentary capacity."

A. "I am not sure that I know just what testamentary capacity means but I expect it is the ability to know what the testatrix is doing when she writes a will. I have already told you that she had ability to write the will at the time and knew what she was doing so she must have had testamentary capacity at the time."

This was the conclusion of a cross-examination which had lasted more than seven hours. The obvious fatigue of the doctor and the fact that the questions were put to him rapidly throughout the entire examination, accounts for the damaging admissions in his answers to the last several questions put to him on cross-examination.

Another method of cross-examining the expert is to show that the alleged eccentricities of the testator replied upon, are possessed by many other persons admittedly not insane and sometimes to separate the hypothetical question into its component parts, selecting therefrom the essential elements which the contestants rely upon, wring from the expert the admission that not one of these elements in itself is sufficient to establish insanity. For example, we will assume in a certain given case that the contestants of the will have produced testimony to show (a) that the testator talked to herself in a rambling manner, (b) that she cursed and swore violently at her children almost habitually, (c) that she would fall asleep while receiving callers, and (d) that she wanted to sell her farm for about half its actual value. All these facts were embodied in a hypothetical question and submitted to an expert witness who testified that the testatrix was of unsound mind. The cross-examination follows:

Q. "Now, doctor, one of the factors set forth in the hypothetical question and upon which you base your opinion that this woman was insane at the time she executed the will, is that she talked to herself in a rambling manner?"

A. "Yes, sir."

Q. "Now, doctor, you have known during your lifetime a number of people who were perfectly sane and yet who frequently talked to themselves?"

A. "Yes, sir."

Q. "And, when an individual talks to himself he usually lets his thoughts run at will and is therefore liable to talk in a rambling manner?"

A. "Yes, sir."

Q. "So that having known many persons who have been perfectly sane and talked to themselves in a rambling manner, you would not be prepared to say that the fact that this testatrix talked to herself in a rambling manner, was standing alone, any proof of insanity?"

A. "No, sir."

Q. "Now doctor, the next thing we come to in this case is that she cursed and swore violently at her children. Is that one of the factors in the case upon which you base your opinion that this woman was insane?"

A. "Yes, sir."

Q. "You are, however, acquainted with very many people both women and men, who occasionally curse and swear at their children?"

A. "Yes, sir."

Q. "And often, they get angry at their children and curse and swear at them in a loud tone of voice in what we would ordinarily term a violent or angry manner?"

A. "Yes, sir."

Q. "And these people of whom I am now speaking are perfectly sane?"

A. "Yes."

Q. "You would not say, therefore, that the fact standing alone that this testatrix cursed and swore at her children was any proof of insanity?"

A. "No, sir."

This method was continued as to all of the factors in the case and, in the end, the doctor admitted that the testatrix had testamentary capacity.

The following cross-examination in an actual case will serve to illustrate several of the suggestions just made.

Mary F., was an aged Scotch lady who died at the age of eighty-five years. She was really of strong intellect. She was left a fortune of some $500,000, by her husband who had died a few years before. She made a will, a year or so previous to her death, leaving her estate to favorite nieces, nephews and other relatives. She also left bequests to various charitable institutions, some twenty-one in number. The family lawyer, who drew the will, testified the old lady told him the names of the different relatives and institutions she wished to make the objects of her bounty, and the amounts she wished to give to each, without prompting. Contestants, an aged brother and sister, placed on the stand two psychiatrists who testified on direct examination that the testatrix was suffering from "senile psychosis" which, boiled down, is the nerve doctor's name for old age, and that she was not in a fit mental state to make the will in question. They had never seen the testatrix. Their opinions were based on hypothetical questions entirely. Unless their testimony on direct examination could be broken down and they were made to admit that the testatrix was competent to make the will in question under the circumstances it was made, the case was one for the jury. The entire case then, for the moment trembled in the balance, the issue to be decided by the successful cross-examination of these psychiatrists. Cross-examination of the doctor:

Q. "Were you ever engaged in private practice?"

A. "No, all my practice has been in neuro-psychiatry."

Q. "Have you had an office like physicians in the David Whitney Building, for instance, and conducted a private practice?"

A. "Yes."

Q. "Not in connection with any institution?"

A. "Yes."

Q. "When."

A. "In the years 1920 to 1924, with the exception of the time I was doing this survey work which I spoke of previously as part-time work at Alton, Illinois."

Q. "And how long were you there?"

A. "That was from 1920 to about 1924."

Q. "You never saw this woman?"

A. "No, sir."

Q. "You are an expert, pure and simple?"

A. "Yes."

Q. "What fee do you charge?"

A. "The fee is entirely up to the hospital. I am employed by the Henry Ford Hospital and my time is contracted for by the hospital."

Q. "You are a salaried man?"

A. "Yes, sir."

Q. "Now, you heard Dr. McGraw testify, didn't you?"

A. "Yes, sir."

Q. "And you heard him testify he put down 'senile psychosis' because she was old and wrinkled and loquacious?"

A. "I heard him testify that she had senile psychosis. I do not recall the remainder of your question."

Q. "We will see what he did say."

Reading from the transcript of the testimony:

> "Q. 'What made you put down the words 'early senile psychosis?' " I asked him and he said,
>
> "A. 'Because she impressed me as being a very old person at the time and because she was, as I noticed, somewhat garrulous.'
>
> "Q. 'Aside from being a very old person, and

as you say looking very old, did she ever have any other signs of senile psychosis?'

"A. 'I have no record of any other signs.'

"Q. 'Well, have all persons who have those signs, that is, being an old person, and garrulous, have they senile psychosis, then, Dr. McGraw?'

A. "No, sir."

Q. "From these signs alone that would not be sufficient to demonstrate that she had that disease, would it? Answer that, I do not want a lecture, just an answer."

A. "On the basis of the findings he gave, I can make the supposition that the diagnosis was that of senile psychosis."

Q. "He said he made it from her being garrulous and looking old, didn't he?"

A. "That I understand."

Q. "I say, didn't he?"

A. "I do not think so."

Q. "Have I got to read that over to you again?

"Q. 'What made you put down the words'—I asked him, 'Senile psychosis, at all?'

"He said, 'Because she impressed me as being a very old person at the time because she was as I noticed somewhat garrulous.'

"Q. 'She was a very old person wasn't she?'

"A. 'She was.'

"Q. 'Aside from being a very old person, and as you say looking very old did she have any other signs of senile psychosis?'

"A. 'I have no record of any other signs.'

"That is what he said wasn't it?"

A. "Yes."

Q. "With those signs, would you still say that she had senile psychosis?"

A. "Based on these other physical findings, yes, sir."

Q. "But he said that he found no other sign?"

A. "Now in his testimony, there are other signs."

Q. "That he did not see?"

A. "That he gave in his testimony."

Q. "Well, he first attributed them to senile psychosis, did he?"

A. "He did not, no, sir."

Q. "Why didn't he?"

A. "I do not know."

Q. "He was a physician, wasn't he?"

A. "Yes, sir."

Q. "Can't an ordinary physician or a physician such as he, discern senile psychosis at once?"

A. "They may give greater credence to certain facts than others."

Q. "Well, wouldn't he perhaps be better able to judge what she had when he examined her and talked with her than you are, not having seen her?"

A. "He could judge on the things which he observed."

Q. "You have not seen her to observe anything, have you?"

A. "No, sir."

Q. "You would not give an offhand opinion of a patient if his father came to the hospital and told you that Jack so and so had so and so. You would tell him to bring him to you wouldn't you?"

A. "I could render an opinion on the basis of the facts which he gave me."

Q. "The first thing you would say to that man would be 'bring him up to the hospital so that I can see him'?"

A. "I could render an opinion."

Q. "I say, wouldn't you ask to have him brought to the hospital?"

A. "Yes."

Q. "They would not allow you to give an opinion of the man if he couldn't be brought, isn't that so?"

A. "Yes, sir."

Q. "It would have to be a case where the patient would not be able to be brought to you or you for some reason would not be able to go to the patient?"

A. "Yes."

Q. "Therefore, personal observation is an essential factor in these cases, isn't it?"

A. "It is very necessary."

Q. "Yes, very necessary, almost absolutely necessary?"

A. "No, sir."

Q. "No? Don't you have patients up there and ask them if they will stay there for observation sometimes for weeks?"

A. "Yes, sir."

Q. "Then observation is necessary, isn't it?"

A. "It is necessary but not imperative."

Q. "Why do you ask them there, just to get the money out of them?"

A. "No, sir."

Q. "Why do you ask them to stay and pay the expenses for their rooms in order to be observed for long periods of time?"

A. "So that we can study all of their symptoms and find out what symptoms each one has."

Q. "To find out what ails them?"

A. "Yes."

Q. "Then observation of that sort is necessary or your hospital would not require it, isn't that so?"

A. "Observation by us or other hospitals or observers."

Q. "Wouldn't you lay any stress on the fact that Dr. Cleland, her family physician of many years and a phy-

sician in practice four times as long as you or five—you saw him here, an accredited physician, a graduate of an accredited school and with forty years experience—wouldn't you lay any stress on the fact that he said she did not have senile psychosis?"

A. "I take it into account."

Q. "Have you taken it into account?"

A. "Yes."

Q. "What account have you given it?"

A. "In what way?"

Q. "You say she has senile psychosis. He says she has not. So, how did you take it into account?"

A. "That has no effect in my judgment, of the case."

Q. "You said you took that opinion into consideration. What consideration did you give it?"

A. "The consideration that it deserved, the opinion of the physician in the case."

Q. "Well, you do not agree with it?"

A. "It was the opinion of the general practitioner and internist, and not that of a neuro-psychiatrist."

Q. "It was because he was not a psychiatrist, that you considered that it was incorrect, isn't that true?"

A. "I did not say that it was incorrect."

Q. "You have a different opinion, haven't you?"

A. "We all have a right to our opinions."

Q. "But you say that because he was a general practitioner and an internist that he had not the skill perhaps to discern senile psychosis when he saw her, is that true?"

A. "I would say that he would not be able to discern the early symptoms of senile psychosis."

Q. "Then the early symptoms of senile psychosis are rather hard to discern?"

A. "In some cases."

Q. "This then was such a case, isn't that true?"

A. "I judge it to be, yes, sir."

Q. "Then what are the early symptoms of senile psychosis?"

A. "Irritability, memory defects, sleeping in the daytime, pressure of blood in the head."

Q. "Well, now do you think taking a nap in the daytime for a person in the eighties is anything unusual?"

A. "I think that it is an indication of arterial sclerosis."

Q. "Do you mean to say that because a person takes a nap when they are eighty years old and not having any business to go to, that this is necessarily a symptom of senile psychosis?"

A. "We judge it as such."

Q. "You judge it as such?"

A. "Yes."

Q. "When you see an old gentleman or an old lady nodding in a chair, why you think they have senile psychosis?"

A. "Yes, sir."

Q. "Do you permit them to sleep at night?" (With sarcasm.)

A. "Yes, sir."

Q. "Is that also a symptom of senile psychosis?"

A. "Accompanying senile psychosis."

Q. "What?"

A. "It accompanies senile psychosis in certain cases."

Q. "When are you going to allow them to sleep?"

A. "They do sleep at nighttime, at times."

Q. "Do you think dizziness in a full-blooded person is necessarily a symptom of senile psychosis?"

A. "It is found in cases of senile psychosis, yes, sir."

Q. "It is found in cases that are not senile psychosis, isn't that true?"

A. "Yes."

Q. "Also sleeping in the daytime, taking a nap is found in people who haven't senile psychosis, isn't that true?"

A. "Yes."

Q. "And varicose veins, is that a symptom of senile psychosis?"

A. "That may occur in any one."

Q. "So may dizziness, may it not?"

A. "Not this type of dizziness."

Q. "Well, being dizzy is being dizzy, isn't it?"

A. "No, sir."

Q. "Well how many types of dizziness are there, for goodness sake?"

A. "We have dizziness due to changes in the labrynth which is one particular type of dizziness of which the manifestations are entirely different from those of other types. We have the dizziness which accompanies cerebral arterio sclerosis, which is entirely different type of dizziness. The manifestations are often expressed by the patient in the same way, but the objective evidence is different."

Q. "Is deafness an essential symptom of senile psychosis?"

A. "It is merely an evidence of the involvement of this nerve, and it usually accompanies changes, especially of an arterio sclerotic nature."

Q. "Suppose she had this deafness for thirty-five years, would you still say that it was a symptom of senile psychosis?"

A. "It would have had another origin."

Q. "What?"

A. "It would have been due to something else."

Q. "What might it have been due to?"

A. "Injury to the head, trauma, infections of the nerve, secondary."

Q. "If the testimony showed that she had this deafness for forty years, you would have to leave that out of your symptoms of senile psychosis, wouldn't you?"

A. "We might and we might not."

Q. "If she had symptoms for thirty years, they would not be early symptoms of senile psychosis, would they?"

A. "It is included in that, yes sir."

Q. "How long does this senile psychosis persist?"

A. "It may run from forty-five years to one hundred."

Q. "Forty-five to one hundred years?"

A. "Yes."

Q. "During all that period of forty-five to one hundred years, the people with it are in such mental condition that they are not able to transact business or make wills?"

A. "Not during the entire period."

Q. "Well, during what part of the time would you say that they were in that state?"

A. "That has to be judged on the merits of the individual case."

Q. "Then senility may begin—at forty?"

A. "Forty-five certain types."

Q. "If you are dizzy at forty or you are deaf at forty or you take a nap in the daytime at forty, you have evidences of senile psychosis?"

A. "No, sir."

Q. "What have you?"

A. "Those may be merely normal manifestations. The diagnosis of senile psychosis is not made upon one symptom alone, but is made upon a group of symptoms,

their duration, the relation of them to their environmental conditions."

Q. "If an old person is irritable, that is a symptom, is it?"

A. "Yes, sir."

Q. "How about a young person, if they are irritable?"

A. "It is not a symptom of senile psychosis in young people."

Q. "It is merely a symptom that they get mad easy?"

A. "Yes, sir."

Q. "The same thing is true of an old person?"

A. "It might be."

Q. "Hasn't an old person the same right to display lack of control of their temper as a young person?"

A. "No, sir."

Q. "They have not?"

A. "No, sir."

Q. "Why not?"

A. "Because they have been schooled all these years not to express their temper."

Q. "Don't you know that a child is much more irritable and has less control over its temper than an old person?"

A. "Yes."

Q. "Irritability in itself is not anything from which you could judge senility disease, is it?"

A. "No, sir."

Q. "Any more than varicose veins are?"

A. "No, sir."

Q. "Taking naps and sleeping in the daytime, is that any evidence in itself of senility?"

A. "It can be, yes."

Q. "It can be, and it may not be, isn't that true?"

A. "It usually is."

Q. "Suppose she was up late the night before at a party, or that her slumbers the night before were disturbed, wouldn't that be a factor as to whether she slept in the daytime?"

A. "It could be."

Q. "If she sat up to ten or eleven o'clock and you found her sleeping in a chair in the afternoon, would you say that she had senile psychosis?"

A. "If the patient was eighty years of age, and had these other findings, I would."

Q. "That is, if she was irritable, had been up late at night and fell asleep in her chair, she had senile psychosis?"

A. "And had all the psysical findings which have been described here previously."

Q. "I notice that you are telling about fat in the brain. Is that why we call dull people fat-heads?"

A. "I do not know the derivation of that term."

Q. "This Belladona business, the testimony is from an aged sister that some forty or fifty years ago, some physician or she by mistake, took an overdose of atrophone or belladona. That is a drug that you put in your eye to enlarge the pupil?"

A. "That is one of its uses."

Q. "It is poison, isn't it?"

A. "If taken in large enough quantities."

Q. "How much do you have to take to be poisoned?"

A. "It depends upon the individual."

Q. "Oh, well, I mean how much would you or I have to take, a quart or a gallon?"

A. "You would not have to take that amount."

Q. "How much?"

A. "I would say—I could not say, because I do not know."

Q. "You have never taken enough to know?"

A. "No, sir."

Q. "Don't you very often find in life, people laying their trouble to medicines that have been administered to them, or that they have taken themselves in their youth?"

A. "Yes, sir."

Q. "I remember myself an old man down in Maine where I used to live who always insisted because his eyelids were red, he was poisoned with mercury when he was a boy?"

A. "Yes."

Q. "And he attributed everything he had to that mercury?"

A. "Yes."

Q. "And yet he was perfectly sane and you can be perfectly sane and have those ideas?"

A. "You can, yes, sir."

Q. "They are merely a sign perhaps of meager medical knowledge and perhaps superstition?"

A. "It depends on the individual case."

Q. "Many people are superstitious?"

A. "Yes."

Q. "They believe in jinxes, haunts and all that thing but that is no sign of senility?"

A. "No not in itself."

Q. "The colored race is very superstitious?"

A. "Yes."

Q. "They do not have senility prevalent among them any more than among any other race, is not that true?"

A. "I have never had occasion to observe a large number of colored people."

Q. "Sailors are superstitious, aren't they?"

A. "Yes."

Q. "Yet, their minds and wills, perhaps on account

of their outdoor life, are more vigorous than yours or mine?"

A. "I would not say that."

Q. "Now suppose that this woman in this case had a meager education; that she wrote with difficulty, but could write her name; that she could read if the print was clear, read the headlines of papers right up to her last illness in 1923, got others sometimes, if the headline interested her, to read the article under it; discussed their contents with intelligence; read Scottish books, Scottish reminiscences; was fond of Burns' poems; was read to perhaps for a long time herself; dictated her business to her business agent; dictated her charities; was benevolent and charitable; attended social functions; in 1922 went to Duluth on a pleasure trip, and in the year preceding or two years preceding, took another extended trip of a week or two—pleasure trip—carried on conversations intelligently; was fond of music; especially Scottish music, and often requested her niece, Eleanor McKay, to play Scottish music to her; talked of topics of the day; when Roosevelt came here in 1921, told one niece that she was sorry that she had not gone to hear him and discussed his speech which had been read to her; talked with different pastors of the Scotch church which she attended and when she went to church, which was frequently up until she got so lame she could not get out of the house, would meet the different members of the congregation, asked them about their different relatives and how they were, who were not present, and who were ill and named them; talked intelligently to her nurses, was neat in her personal appearance and required that her house be kept neat; that her business agent never did anything of any moment; carried on no transaction involving over $500, without taking her advice; supposing all those things were true, and also in

1922 or 1921, anyway after the will was made, she had a neighbor, an old friend, make out a list, she dictating the list, to whom she would give her jewelry and personal belongings; I would say the list comprised some twenty-five pieces and she gave it to as many different ones, entirely without help, at her own dictation and signed it. What influence would those facts have on your opinion that you have just given?"

A. "Those in addition to the ones which he gave?"

Q. "Take it as you will. Suppose those things are true, as I say?"

A. "Will you please read that last over again?"

Q. "You do not want that all read over again do you? You surely could carry that in your mind? You have not got senile psychosis. Go ahead."

A. "I will have to give it thought."

Q. "Well, think away. I will give you all the time you want. Now you have had time to think up an answer."

A. "Assuming these facts are true that have been given at the present time, it would modify my opinion."

Q. "To what degree would it modify your opinion?"

A. "It would modify it so I would want additional evidence."

Q. "It would put up in such shape that you would not say that she was not able to make a will, isn't that true?"

A. "I would not say that. No, sir."

Q. "You would not. Would you say that with those facts she was still unable to make a will? Answer that yes, or no?"

A. "I would want additional facts."

Q. "What additional facts would you want, with that statement? Don't you want to be fair here?"

A. "Yes, sir."

Q. "What additional facts would you want, with that long statement, in order for you to ascertain whether she was able to make a will or not when with the meager facts that you have been given, you say that she was unable to make a will? What additional facts would you want?"

A. "I would say that there are a great many conflicting things which would have to be straightened out on both sides."

Q. "What conflicting things? I am not asking you to believe these things. Can't you, in your mind, suppose that those are true? Is there anything conflicting in those facts that I have given you? If so, what are they?

A. "In her behavior towards others."

Q. "In her behavior towards others?"

A. "Yes, sir."

Q. "You have said that irritability in itself was not an essential to disease or senility, have you not?"

A. "It may be an evidence of it."

Q. "What would you say, supposing those facts to be true, as to whether or not she was able to make a will or not such as this one?"

A. "Based on the facts which you have given me alone, I would say that she was able to make a will."

Q. "Now, then supposing when this will was made—you are familiar with it. You have read it over once?"

A. "Yes, I read it once."

Q. "Before you came over here and you heard Dr. H.—you were here and you heard him. You were here all day yesterday and the day before?"

A. "I was not here yesterday."

Q. "I beg your pardon, you sat here yesterday because I saw you, and you heard all the doctors testify."

A. "Not yesterday, I was not here yesterday."

Q. "When was it?"

A. "The day before."

Q. "Oh, the day before. Now, Dr. H. said that he counted the legatees and devisees, these people in institutions who received her bounty?"

A. "Yes, sir."

Q. "And that there was some twenty-four of them. You heard that didn't you?"

A. "Yes, sir."

Q. "William M., her lawyer, whom you did not hear, testified that previous to the sixth day of June, 1918, he went to her house; that she had no list; that he talked with her and that she gave him orally by word of mouth, these different names; my niece Phoebe M., my niece Ella M., my niece Edith F., my niece Elizabeth C., my nieces Flora, Grace, Mary M., and Mary T., my sister, Mrs. Grace M., Mrs. William B., to my niece Mary B., to my grand niece Mrs. Phoebe F., to my nephews John M., and Archibald C., to my sister-in-law, Mrs. Thomas Mc., to my nephews Thomas B., and Marchibald Mc., to my cousin, Rev. Duncan M., to my cousin Mrs. Barbara W., to my cousin Grace Mc., to my husband's niece Nellie, and so on down through the twenty-four; told him the amount she wanted to give each and also told him what to do with the residue, or what was left; that she carried these matters in her mind; that there was no one there to talk to her in the room except she and him; that she conversed intelligently and that it was from her alone that he got the date. Now, if she could do that on June 6, 1918, without the assistance of anybody, wouldn't you say that she had the mental capacity to make this will?"

A. "Not that list alone."

Q. "Not that list alone?"

A. "No, sir."

Q. "How much of a list would you want? What has

she got to do to show mental capacity except to distribute to her relatives the property she had?''

A. ''She has to show the ability to know them and the ability to recognize the relationship to her, and the ability to carry the environmental associations and factors which have been taking place for the past few years together with that. The mere giving of a list is not sufficient.''

Q. ''If each one of these people turned out to be in the relationship which she told them they were, didn't she then identify them? Didn't she identify them if she named them and gave the relationship?''

A. ''She identified them individually.''

Q. ''You mean she has got to go look at them and say, 'This is my grand niece. This is my grand nephew. This is another nephew'?''

A. ''It [the hypothetical question] does not say that she recognized the relationships, other than in that particular list, that is, she can carry the names and the relation to her but not the relation to the group.''

Q. ''If it turned out that list was correct, and she had carried that relationship in a correct manner, wouldn't that prove that she knew who her relations were?''

A. ''If she carried that relationship in a judging manner in which she could go along and judge the relationship one to another, yes, sir.''

Q. ''If you made out a list of your relatives and you named them correctly, doesn't that show that you know who your relatives are, when you have named twenty-four? Say yes, or no.''

A. ''That merely shows that there is a memory of those relatives.''

Q. ''That shows that you remember who your relatives are?''

A. ''It shows that you remember them, yes, sir.''

Q. "Then when you stated the amounts that you want to give to them, doesn't that show that you are discerning?"

A. "It may and it may not."

Q. "What other requirements do you as a psychiatrist think that a person should have in order to make a will than those that I have delineated here?"

A. "They have to have this judging ability."

Q. "What judging ability?"

A. "The ability to consider her situation at the end; namely, the business of making that will."

Q. "Isn't that the business of making a will, picking out your relatives and giving them what you like? You can be as capricious as you want to, can't you, in making a will? You can cut out all your relatives if you want to?"

A. "I do not think so."

Q. "You do not think so. I will tell you that you can. If you want to make a will, you can cut out every relative you have and leave it to a cat or a dog, or an institution. Don't you know that?"

A. "I knew that it had been done."

Q. "Did you think that you could not do it?"

A. "That I did not know."

Q. "You just said then that you understood it could not be done, didn't you?"

A. "I said that I understood ——"

Q. "Have you been answering all these questions that you have been answering with that understanding in mind?"

A. "No, sir."

Q. "What understanding have you had in regard to whether a person can be capricious as long as he has the mental ability to make a will?"

A. "I understand that they can be capricious but

that does not mean that the capriciousness is just plain judgment to ascertain the facts and relationships."

Q. "If you had fifty relatives, you can leave it to a neighbor if you want to. Do you know that?"

A. "Yes, sir."

Q. "Now, if this woman remembered twenty-four relatives or twenty-four institutions and relatives and discussed property intelligently with her lawyer, told him the amount she wanted to give to each, you still say that after that time she had not the mentality to make this will, do you?"

A. "If she discussed these things."

Q. "I say, answer that. Do you still say that she had not the mentality to make this instrument?"

A. "If the facts as you gave them are correct, she did have."

Q. "She did have. That is all."

The Legal Expert

Occasionally it becomes necessary for an attorney to cross-examine members of the legal profession as to the value of legal services rendered in suits between lawyers and their former clients. At best, the duty of appearing against a fellow practitioner is unpleasant, but there should be no hesitancy in undertaking it. One who refuses to appear for the defendant in a case where another lawyer is suing for an excessive fee is doing an injustice to the entire bar. In such litigation, the cross-examiner will be required, not only to face the lawyer plaintiff, but also other lawyers called to testify to the value of the plaintiff's services. If the bill sued upon is deemed to be unjust and disproportionate to the services rendered, the witness should be closely questioned respecting the following controlling factors:

(a) Charges made for services of a similar nature rendered by other members of the legal profession of like skill and experience.

(b) Value to the client of services rendered.

(c) Time consumed and effort spent.

(d) Magnitude of the subject-matter with respect to which services were rendered.

In actions by lawyers against their clients, it will be found that very many keep no record of the time consumed upon a case and that frequently their estimate of same is based upon no written data. This situation is unfortunate, because it gives life to the charge that professional records are not kept after the manner of business concerns. The cross-examiner should take whatever advantage of this situation the equities of the case seem to require. Where he is satisfied that the charge made is excessive, he may then safely go into the question of what charge is customary for services of a similar nature. If the fee is an unusually large one considering the situation of the lawyer making the charge and the service rendered, he may then be asked how many clients or what clients he has charged a similar fee.

In a suit recently tried where a lawyer was attempting to collect a fee of five thousand dollars for defending a prohibition case in which the client had pleaded guilty, an expert witness testified that the services of the lawyer were worth from $3500 to $6,000. This was exceptionally large for the character of the cause. A skilful cross-examiner would have brought out from the expert that although an active practitioner and specializing in this line of work, he had never charged a fee of this size for similar services. He might also well have developed the fact that the expert knew of no one who had ever charged a fee of that size for similar work.

When a lawyer takes the stand as a plaintiff in a suit for legal services or when an expert takes the stand to testify as to the value of such services, he thereby opens the door for the cross-examiner to interrogate him fully as to his knowledge of the law pertaining to the services for the value of which suit is brought. He also may be interrogated as to the various remedies which were open to him on behalf of his client, why the remedy he selected was the proper one and to his own knowledge of the law generally, in reference to the case or transaction which he handled. As an example, take the case of a lawyer who had handled a claim of ten thousand dollars for a client. This attorney had filed a bill in equity which was exceedingly voluminous and had required a great deal of time in preparation. The action should have been started on the law side of the court which could have been done with very much less work. Indeed, it was extremely doubtful whether or not the action was one cognizable by a court of equity. After the case had been pending for some time, the client settled it directly with the adverse party and the lawyer brought suit for a three thousand dollar attorney fee. The plaintiff took the stand and testified that he had spent about one month in preparing the case and that more than two weeks had been spent by him in the preparation of the bill of complaint alone; that he was thoroughly familiar with the charges customarily made in similar matters. The following is a part of his cross-examination:

Q. "What are the equitable actions you may bring in this state?"

A. "Actions for divorce, actions for specific performance and actions to set aside transactions for fraud."

Q. "What other equitable actions do we have?"

A. "I am not able to recall any just now."

Q. "Did you ever hear of the action to quiet title?"

A. "Yes, sir."

Q. "Is that a legal or equitable action?"

A. "I am not sure which it is."

Q. "What tribunals try equitable actions and what tribunals try the legal actions."

A. "The equitable actions are tried by the court and legal actions are tried by the jury."

Q. "The action to quiet title is quite a common action, is it not?"

A. "Yes, sir."

Q. "Do you want to, now, tell the jury that you are unable to say whether you would try the action before the court or a jury?"

A. "I told you, I was not sure."

Q. "One of the defendants in this case, Mr. S. is financially responsible, is he not?"

A. "I don't know."

Q. "His financial responsibility is in excess of $100,000?"

A. "I told you that I do not know what his financial responsibility is."

Q. "Did you have a good claim against S. for the amount of your client's loss?"

A. "I did."

Q. "What was there to prevent you from suing S. in an action at law and collecting the full amount of your client's claim?"

A. "I thought the equitable action was the better remedy."

Q. "That is not what I asked you. The question is, 'What was there to prevent you from bringing an action at law against S. and collecting the full amount of your client's claim'?"

A. "I told you I thought the equitable action was

the better remedy and besides that I did not know whether or not S. was financially responsible."

Q. "Had S. been financially responsible, you could have collected from him in an action of law?"

A. "Yes, I suppose I could."

Q. "Then, sir, was it not a matter of the greatest possible importance in the handling of this matter to investigate the financial responsibility of S.?"

A. "I did not think so then."

Q. "Do you think so now?"

A. "Well since I have had time to reflect perhaps it was—"

Q. "Do you think so now?"

A. "I would say yes."

Q. "When the case was given to you, you had abundant time to reflect upon the proper course to pursue in handling it?"

A. "Yes, I did."

Q. "And your client never suggested what course you should pursue?"

A. "No, sir."

Q. "Can you assign any reason why you did not investigate the financial responsibility of S.?"

A. "Nothing more than I did not think of it."

Q. "But it was your duty was it not to take all the steps in handling this matter that would benefit your client?"

A. (No answer.)

Q. "The action at law in this case could have been filed by the issuance and filing of a praecipe for a summons. It would not have required to exceed thirty minutes. Isn't that true?"

A. "Well, substantially so."

Q. "And you could have prepared your declaration in not to exceed three or four hours could you not?"

A. "Possibly so."

Q. "And one day at the outside, would have been sufficient for taking the statements of fact."

A. "Probably so." (At this junction plaintiff's forehead was covered with beads of sweat.)

Q. "So that if you had brought an action at law, two days' time, at the outside would have been sufficient for you to have launched this suit in court?"

A. "Yes, sir."

Q. "Whereas, by pursuing the equitable action, you state that it took you two weeks to prepare the bill of complaint and two weeks of preparation."

A. "Yes, sir."

Q. "If S. were financially responsible, you would have been reasonably sure of collecting your client's claim by the action on the law side of the court?"

A. "I presume so."

Q. "Now, will you please tell the jury what advantages your equitable action had over the legal action?"

A. "Well, we were able to bring in more parties."

Q. "Why bring in more parties if S. were financially responsible and your right to recover was clear against him?"

A. "I told you before that I wasn't sure of what his financial responsibility was."

Q. "Yes, but you took no steps to ascertain what his financial responsibility was, did you?"

Plaintiff remained silent.

Q. "What other advantages did your equitable action have over your legal remedy?"

A. "We would have the advantage of trying the case before the court instead of a jury."

Q. "But your client is an elderly woman and do not women, as a rule fare better before the jury than men?"

A. "I should say they do."

Q. "Consequently the jury would be a favorable tribunal for your case with a woman as the plaintiff?"

A. (Plaintiff was silent.)

In support of the plaintiff's testimony, he called to the stand several prominent members of the bar who testified, on direct examination in response to a hypothetical question embodying a history of the case and of the services performed, that such services were worth the sum of $3,000. The following cross-examination of Mr. W., one of the experts, is typical of the others.

Q. "You have based your opinion in this case upon the assumption that the work performed on behalf of the client was necessary in the case and that the lawyer pursued the proper remedy under the circumstances in order to effect the collection of his client's claim?"

A. "By all means, yes."

Q. "Now, what would you say if the lawyer in this assumed statement of facts had elected to pursue his action in equity when had he pursued an action at law, he could have accomplished the same results in two days' time?"

A. "If that were the case, I should want to, radically, modify my opinion."

Q. "Is it the duty of the lawyer, in handling the case for a client, to exercise a reasonable amount of skill and professional knowledge?"

A. "It certainly is."

Q. "And if the lawyer through lack of skill and professional knowledge, fails to utilize a plain and obvious remedy on behalf of his client and instead resorts to a more complicated form of action and one that requires much more time and effort, he ought not to recover for such additional time and effort expended. Would you agree with that statement?"

A. "I certainly would."

Q. "So, the mere matter of time expended on a case is, of itself, not an important criterion in fixing the charges especially if such time has been unnecessarily spent?"

A. "The time must be spent in pursuing the proper remedy or invoking the proper action. If the lawyer fails to exercise a reasonable degree of skill and professional knowledge in selecting the form of action he brings for his client, I should want to say frankly that his services might not be worth anything."

The jury in this case, returned a verdict for $200.

The Real Estate Expert

In most large and growing centers of population, such as New York, Chicago, Detroit, or Los Angeles, from one to five courts are continuously engaged in the condemnation of real estate for public purposes. These include street widening cases where thousands of parcels of real estate may be involved in a single proceedings, the condemnation of large areas for park purposes, play grounds, air ports, and for various other municipal undertakings. In the city of Detroit, from two to three courts are continuously engaged in this class of litigation. Its rapid increase in recent years has served to focus attention on the real estate expert as the determining factor in fixing values. Before attempting to cross-examine such an expert, it is absolutely essential that counsel inform himself concerning the fair market value of the property about which the former will testify. This is necessary in order that the attorney may test the expert's testimony. If the witness is telling the truth and actually gives a fair valuation, no attempt should be made by cross-examination to shake him, as such would undoubtedly bring out other facts tending to support, rather than discredit him. If he has testified truthfully,

the examination should be confined to the amount of compensation he is receiving for his testimony and the frequency of his appearances in court in similar capacities. In undertaking, however, to discredit his valuation of the property, a very excellent question to ask first of all, is this: "What preparation did you make to come here and testify in this case?" The very form of this question implies that before this or any other witness undertakes to testify concerning the valuation of the real estate as an expert, some extensive preparation should be necessary, and when in answer to this question, the witness testifies that he merely looked at the property, and this is all he usually does do, the combination of the question and answer just given somehow tends to make the preparation of the witness seem strikingly inadequate, and right then and there he begins to shrivel in importance.

If he has placed a higher valuation on the parcel than it warrants, the force of his testimony can usually be minimized by asking him whether or not he knows that a certain described lot in the immediate vicinity of the one in question was actually sold for a given sum much less than his present appraisal. He should then be asked if he knows that various other parcels in the neighborhood are held at much lower figures. If the cross-examiner is able to point out a number of such parcels so held, the expert's testimony will be rendered of little value. Again, in cases where the expert has appraised the property for less than its actual value, sales of similar parcels in the vicinity for a greater amount if pointed out to him on cross-examination, will similarly minimize his testimony.

Again, not infrequently the professional real estate witness is found who has abandoned his own business and appears in court day after day appraising property

for financial remuneration. Such professional witnesses, if closely questioned as to the sales they have made, covering a period of time immediately prior to the trial, can be easily unmasked. If counsel has reason to believe that the witness is of this type, he can start his cross-examination touching this phase of the real estate expert's qualifications as was done in the Meyers Road case recently in Recorders Court for the City of Detroit. The witness, G. O., was on the stand. He had testified to a valuation of $50,000 on a piece of property which counsel for the city had reason to believe was worth about $18,000. He was cross-examined by Arthur Lederle, assistant corporation counsel:

Q. "Will you enumerate the sales that you made as real estate broker during the past year, that is, the calendar year of 1928?"

A. "In the past year, I haven't made any sales."

Q. "You have made no sales?"

A. "I haven't made any sales in the last two years."

Q. "All right, 1927"

A. "In the early part of 1927, I did make a sale."

Q. "Don't go so fast. I want to make some notes here. In 1928, you handled no real estate transactions?"

A. "No."

Q. "Do you still maintain your broker's license to do business?"

A. "Yes, sir."

Q. "Do you still advertise as a real estate dealer?"

A. "No, sir."

Q. "Do you still claim to be a real estate dealer?"

A. "Oh, I do, when I get the time."

Q. "You claim it when you have time?"

A. "When I have time, yes. When I have time I usually take some special piece to work on."

Q. "Are you a realtor?"

A. "No, I am a common ordinary real estate man."

Q. "Are you a member of the Detroit Real Estate Board?"

A. "No, sir."

Q. "Were you ever a member of the Detroit Real Estate Board."

A. "No, sir."

Q. "Did you have a license to sell real estate in 1927?"

A. "Yes, sir."

Q. "Did you sell any?"

A. "I say I can't remember whether it was the early part of 1927 or the latter part of 1926 that I made my last sale."

Q. "How much did you pay for your real estate broker's license in 1928?"

A. "Ten bucks."

Q. "And for that ten bucks you haven't got a nickel out of it this year, have you?"

A. "No, I haven't sold any."

Q. "You haven't sold any, so you are just ten dollars out so far this year?"

A. "I am liberal. I like to give it to the state."

Q. "You like to give it to the state?"

A. "I got it in my pocket if you want to see it."

Q. "No, I don't want to see it. Used to carry one of those myself and the only reason I quit, I couldn't afford to pay the $10 unless I made some sales."

A. "That is just the difference between you and I. I am liberal."

Q. "Now, in 1927, will you enumerate the sales you have made?"

A. "I couldn't tell you, as I say, I don't know whether it was the early part of 1927 or the latter part

of 1926 I made the last sale. I don't know. The last two years I really haven't tried to sell any property."

Q. "What was the sale that you made in 1926, or the early part of 1927."

A. "If I remember correctly, the last was property I sold, a piece of industrial property on Russell and Milwaukee Junction district."

Q. "What was the total amount of that sale?"

A. "Forty-five thousand dollars."

Q. "That was all one parcel, was it?"

A. "Yes, sir."

Q. "And who did you represent, the seller or buyer?"

A. "I represented the seller."

Q. "You represented the seller. Was there any other real estate dealer involved in that case?"

A. "No, sir."

Q. "Did you sell any other property in 1926?"

A. "Well, I think I did, but I can't recall."

Q. "Well, did you make so many sales you can't remember, or so few you have forgotten."

A. "So few; so few."

Q. "Did you sell any property in 1925?"

A. "Yes."

Q. "What did you sell in 1925?"

A. "I sold a lease on Grand River, that I remember."

Q. "Well, now, so that you don't accuse me of divulging something I got in private, you sold that to one of your relatives didn't you?"

A. "I sold it to him."

Q. "Do you remember any other transactions in 1925?"

A. "Yes, I sold the same gentleman a corner, on the corner of Third and the Boulevard."

Q. "Well, that is one transfer. Were there any others in 1925?"

A. "Oh, I would have to refer to my records."

Q. "You have no recollection of making any other sales in 1925?"

A. "I can't recall."

Q. "And in connection with the Livernois case, you, in company with other real estate dealers sent out solicitations to the property owners on that street soliciting business, didn't you?"

A. "Yes, sir."

Q. "And you agreed to testify in that case on the basis of a contingent fee that you were to have a certain percentage over the valuation that the city had agreed to give?"

A. "In some instances."

Q. "That is, in other words, you entered into a contract and you said to these property owners, 'I will go in and appraise your property——' "

A. "No."

Q. " '——and if the jury raises the city's figures, you give me a certain portion,' is that right?"

A. "No, we entered into a contract with the attorney representing the owner."

Q. "Oh, you entered into a contract with the attorneys to that effect?"

A. "Yes, sir."

Q. "As a matter of fact, what have you been doing since you left the city, is going out soliciting business to testify in condemnation cases, is that true?"

A. "I don't go out soliciting."

Q. "Well, you went soliciting, of course, on the Livernois, didn't you?"

A. "When I first left the city of Detroit, I sent out announcements stating that I had left their service and that I was open for business, the same as you would do if you left the city of Detroit tomorrow, and if you had

nerve enough to leave them; you would send out notices that you had left the city of Detroit's employ and you had opened an office for yourself at such and such a place."

Q. "Well, now, I don't know that any nerve is an issue in this case, but I would, as a matter of curiosity, like to know what you mean by my not having nerve enough to give up my position with the city."

A. "Give up your salary. If you had nerve enough to give up your salary and go out for yourself and work on your account."

Q. "I see. Now, as a matter of fact, that wasn't what you did on Livernois. You sent out letters asking those people for a job appraising their property did you not?"

Mr. Tarsney: "I object to that as incompetent, irrelevant and immaterial and no part of this case. Don't answer that question."

Q. "I will go to Davison Avenue. Isn't that what you did on Davison Ave.?"

A. "Davison and Livernois, yes, sir."

Q. "Yes, sir?"

A. "Just at the time when I left the city's employ I sent out notices I had left their employ and they were going to have their property condemned, and I would like to have them hand the letter to their attorney."

Q. "Now, have you got a copy of that letter with you?"

A. "No, I have not. It wasn't a typewritten letter. I had them printed in a printing establishment because there were several thousand of them."

Q. "And you haven't any of those left?"

A. "I will tell you candidly, I haven't."

Q. "You haven't?"

A. "No, I wouldn't know where to look for them."

Q. "All right. You can't get those then and that

was the same kind of letter you sent out on Davison Avenue?''

A. ''Yes, sir.''

Q. ''Now, what did you do on Gratiot Avenue. Solicit business there?''

A. ''No, sir.''

Q. ''Do you want us to understand now you didn't call up one of the lawyers on that street and tell him you would be willing and glad to testify for him on that street?''

A. ''The only man I recollect calling up on Gratiot Avenue was Howard Colby.''

Q. ''And he was one of the attorneys, and had most of the parcels and on that section of Gratiot Avenue?''

A. ''I called him up and told him I understood he had some Gratiot frontage and told him I was open to help him. I didn't know what he had, one or two or three parcels, or what he had.''

Q. ''But you called him up for the purpose of telling him you would be glad to testify for him?''

A. ''Yes, sir.''

Q. ''At that time you didn't know what the city's appraisal would be on any one of those parcels, did you?''

A. ''No, long before the case was tried.''

The Handwriting Expert

That lawyer who is competent to cross-examine the handwriting expert in all phases of questioned documents, must, himself, be thoroughly familiar with the subject. A larger volume than this would be insufficient to cover it. The discussion here will, therefore, be confined to those methods which may be employed by the lawyer who is possessed of only average knowledge and learning on the subject of questioned documents. No

lawyer should undertake the cross-examination of either the expert or the nonexpert on the subject of a handwriting, where substantial interests depend on the outcome of the litigation, unless he has read and thoroughly digested some of the authorities thereon. Before he can intelligently interrogate the handwriting expert, he must, of course, know whether or not there are any errors or mistaken conclusions in the latter's testimony. It is insufficient merely to suspect that a document is not genuine, but the suspicion must be directed to some definite and specific point and it must be kept in mind that it is just as important, by cross-examination, to sustain a genuine document, as it is to attack and overthrow a fraudulent one. The lawyer should, therefore, be familiar with the following facts, which are well known to handwriting experts:

(a) That where a preliminary inspection is made of signatures, the quality of the lines is usually much more significant than the letters. A forger, either by tracing or by skilful imitation, may reproduce the forms of the letters with such fidelity and exactness as to pass the signature as genuine. A deficiency of the lines will indicate the unnatural character of the writer. It should be noted here that a forged signature is usually either a skilful free-hand imitation or may be traced.

(b) That the document may be changed by the addition of figures or words or paragraphs or, in some cases, even pages may be added and this done whether the document is in handwriting or in typewriting. Paper usually has a water mark and this water mark may have a date significance which will establish that the paper on which the document is written had not been made at the

time of the date it bears. This can be ascertained by securing data on the subject from the manufacturer.

(c) A signature to a document may be genuine, but it may have been signed to a different document entirely, the former writing having been carefully erased and the fraudulent matter written above it. It should be born in mind here that various chemicals exist which will permit the erasure of writings so skilfully that it is almost impossible to detect the erasure with the naked eye. It is often very difficult to detect such erasures with a microscope.

(d) Some documents are so framed that a piece may be torn from the edge of the paper and by thus deleting certain words, the entire meaning of the document will be changed.

(e) Typewritten documents are usually more difficult to forge than handwriting. Especially is this true, if the document purports to be an aged one. It many times occurs that a spurious document has been written on a typewriter which was not even in existence on the date alleged.

(f) Where a paper contains folds, these will usually show whether or not the writing preceded or came after the making of the folds.

(g) It is quite common that words may have been added to a check or other vouchers after having been paid.

(h) Under the microscope where one line or stroke crosses the other or runs into another, the order in which they were made will be readily revealed.

(i) The figure "1" is easy to change to certain other figures by addition of the necessary pen strokes.

(j) The chirography of the country has gradually changed during the past seventy-five years and that a specimen of handwriting, say in 1850, will bear certain characteristics not possessed by a handwriting in the year 1900.

(k) An expert may sometimes detect whether or not the writer was schooled in England or continental Europe.

(l) That an individual's signature ofttimes in form and design, undergoes a gradual evolution, so that his signature, written in 1925, will differ, quite materially, from the same signature in 1905. This gives the signature of such an individual, a date significance and a forgery may thereby be unmistakably detected.

Whenever the facts and circumstances surrounding a document are of such a nature that its genuineness is rendered improbable, the lawyer should not hesitate to submit the same to a handwriting expert together with a complete history thereof and a statement of the facts. This should be done, even though it may appear entirely flawless on its face as many of the indicia of forgery are only revealed, even to the expert, with the aid of the microscope. While, in the early days of the handwriting experts, the court and jury were compelled to rely largely upon their opinions as to whether or not the questioned document was genuine or spurious, the body of knowledge in their field has grown so rapidly in the past half century, that the value of their testimony in a given case, will be based very largely upon their ability to back same up by ocular demonstrations; the court stated the matter succinctly in Gordon's case, 50 N. J. Eq. 397, 26 Atl. 268, in the following language:

"Handwriting is an art concerning which correctness of opinion is susceptible of demonstration and I am fully

convinced that the value of the opinion of every handwriting expert as evidence must depend upon the clearness with which the expert demonstrates its correctness. Thus comparison is rated after the fashion of circumstantial evidence, depending for strength upon the number and prominence of the links in the chain. Without such demonstration, the opinion of an expert in handwriting is of low order of testimony, for, as the correctness of his opinion is susceptible of ocular demonstration, and it is a matter of common observation that an expert's conclusion is apt to be influenced by his employer's interest, the absence of demonstration must be attributed either to deficiency in the expert or lack of merit in his conclusion. It follows that the expert who can most clearly point out will be most highly regarded and most successful."

With the foregoing discussion in mind, how then should a lawyer cross-examine the handwriting expert? The answer is, the latter should be driven to an ocular demonstration of the points upon which he relies. By that is meant he should be compelled, in every instance, to point out to the jury the specific thing about the writing which stamps it as spurious or genuine. He may give a learned address on the witness stand, using a highly technical phraseology, but, after all, he should be forced to admit that his conclusions are based upon certain characteristics of the writing which the jury itself can see as well as he. If the expert is sound in his conclusions, he had better be dismissed without any cross-examination at all. But in those cases where the ocular demonstration is quite feeble, and the cross-examiner has every reason to believe that the expert is either biased in his opinion or mistaken in his conclusions, a cross-examination should be undertaken.

The expert usually starts off in his direct examination by detailing his experience as an examiner of questioned handwriting. He will probably then produce, in court, samples of the genuine handwriting which he has compared with that in question and he will then, usually, give his reasons why, in his opinion, the handwritings are or are not written by the same person. He will, doubtless, be prepared with the letters in the disputed document, magnified to many times their normal size and then photographed. Thus magnified and photographed, all the minor peculiarities in the letters stand forth plainly revealed. If the expert has testified that such writings were made by the same person, the direct examiner will ofttimes stop at that point and turn the expert over for cross-examination. If the testimony has been that the writings are identical and if the cross-examiners have reason to believe that they are not, but were written by different parties, then the attention of the witness should be drawn to the point of dissimilarity between the writings. Each letter should be taken up and examined as to the most minute detail and the witness should be made to state wherein each letter of the genuine signature differs from the alleged genuine signature. The following cross-examination of an expert on handwriting in a recent case will illustrate this method.

Helen S. was suing to set aside a conveyance of real estate made by her husband. While an action for divorce was pending between them, her husband forged her name to a deed, received the full purchase-price of the property and then absconded to parts unknown. In an action to set aside this fraudulent conveyance, a handwriting expert took the stand on behalf of the defendant and testified that the signature on the forged deed was the genuine signature of Helen S. This handwriting expert had the thorough confidence of the court trying the case and

it was necessary to shatter his testimony or retire defeated.

The cross-examination follows:

Q. "Now professor, you have the photographs of each letter of this questioned signature magnified to many times its normal size. In examining these letters, is there anything that you can see about them that would not be visible to me?"

A. "No, sir."

Q. "Well, then let us examine, in detail, each letter of the signature commencing first with the letter 'H,' the first letter of the questioned signature. What is there that you see about that letter that resembles the letter 'H' in the genuine signature?"

A. "The stroke on the right hand side of the letter is practically the same and there is a curve at the bottom of the right hand stroke of the letter, also the same, and in addition to that, the bottoms of the two letters look almost identical."

Q. "But look, professor, the upper end of the left hand stroke does not resemble the genuine signature, does it?"

A. "No, sir."

Q. "And the top of the letter itself does not resemble the genuine signature?"

A. "No, sir."

Q. "And the cross bar on the 'H' is not made like the cross bar of the 'H' of the genuine signature?"

A. "No, sir."

Q. "And the left hand side of the letter, that is to say, the left hand stroke, doesn't resemble the left hand stroke of the genuine signature."

A. "No, sir."

Q. "So, you have discovered three points in the letter 'H' of this questioned signature, which resembles the

letter 'H' of the genuine signature and we have discovered in our examination together, four points of difference between the letter 'H' of the questioned signature and the same letter of the genuine signature. Is that not correct?"

A. "It is."

Q. "Now, take the letter 'E.' Tell me, the points of similarity you note in 'E' of the questioned signature and the 'E' of the genuine signature."

A. "Well, the lower curl on the 'E' resembles the genuine signature as does that portion of the letter where the curves of the letter unite in the center."

Q. "Yes, but the top curve of the letter is slightly different."

A. "Yes, sir."

Q. "And the entire letter lacks the width of the genuine signature."

A. "Yes, that is true."

The cross-examiner then proceeded to take the learned professor over each letter of the questioned signature and in nearly every instance, points of dissimilarity could be found with respect to each. The cross-examination was long and tedious and occupied some five or six hours but its effectiveness was demonstrated by the fact that the court rejected the spurious document although announcing complete confidence in the honesty of the expert.

It frequently happens that a party to the litigation finds himself in court under the necessity of proving that his adversary wrote a certain letter or executed a certain document which is relied upon by either the plaintiff to establish or by the defendant to disprove some important fact in the case. If the letter or other document has been received through the mails, it often becomes exceedingly difficult for the party relying on such docu-

ment to prove the execution thereof, especially if the party who executed the same denies it and no samples of authentic handwriting are available to the party seeking to prove the same.

Here, of course, the expert can be of no assistance, because, first of all he must have a genuine sample of the handwriting of the party before he can testify as to the authenticity of the disputed document. In such a case, it is advisable to call the adverse party to the stand, under those statutes which permit the adverse party to be examined, and compel the witness to sign his name or give other samples of his writing which may be compared with the original. Occasionally there will be idiosyncrasies in even the writing or spelling in the document relied upon, which can be brought out in the samples obtained from the witness. The cross-examination should be directed towards these peculiarities in the questioned document. For example, if a witness habitually mispells a word, he will quite likely do so under any and all occasions and will usually spell the word the same way.

The writer recalls an instance where a suit had been filed on a promissory note against which the statute of limitations had run. The law in that jurisdiction after the running of the statute was that if afterward the maker thereof acknowledged the indebtedness in writing and promised payment, an action could be maintained upon such subsequent written promise. The action in this case was based upon a letter received by the plaintiff from the defendant through the mails. The note was given by the defendant, J. R., but upon the trial, both he and his wife S. took the stand and testified that she wrote the letter without the knowledge or consent of her husband. It was necessary then and there to show the court that they were both lying, or lose the case, nor was there any evidence to negative this claim.

The letter relied upon, was in the following form:

"August 15, 1917.

"Mr. F—— E——,
"Indianapolis, Indiana.
"Dere Sir:—

I am very sory that I aint ben in position to pay you the note of $4700 now long passed du. We have had mutch sikness in our family and you know yourself we have had a lot of other bad luck, but I will pay you this note and with the interest too, and in the next few months as I am now getting on my feat again. You need not be worried.

"Very respectfully yours.
(Signed) "J—— R——."

J. R. was required to render samples of his writing in open court and while these resembled somewhat the letter, the lack of resemblance being no doubt due to intentional disguise, it was hardly sufficient to make the jury conclude that he had written the letter instead of his wife. The following cross-examination occurred:

Q. "Mr. R., write the word 'dear.'"
A. Witness writes "dere."
Q. "Mr. R., write the word 'sorry.'"
A. Witness writes "sory."
Q. "Mr. R., write the word 'been.'"
A. Witness writes "ben."
Q. "Mr. R., write the word 'past.'"
A. Witness writes "passed."
Q. "Mr. R., write the word 'due.'"
A. Witness writes "du."
Q. "Mr. R., write the word 'much.'"
A. Witness writes "mutch."

Q. "Now, write the word 'sickness.'"
A. Witness writes "sikness."
Q. "Now, write the word 'feet.'"
A. Witness writes "feat."

Counsel then read the way the witness had spelled each one of these words together with the spelling of the same words in the letter, which was identical in every case, and the result was that the jury was out only five minutes and returned a verdict for the full amount of the note and interest.

CHAPTER 18

THE FIRST QUESTION

Under the title of this chapter could be written a fair summary of the principles previously outlined in this volume. "To get off on the right foot" is an advantage not to be discarded in the commencement of any successful cross-examination. Many notable lawyers make a particular study of this one question: how to first approach an adverse witness, to introduce one's self to him, and through him to present one's subject to the court or jury. This is an art which if thoroughly mastered is an accomplishment in itself.

Outside of an unusual turn that may occur during the direct interrogation of a witness by reason of some unexpected answer a cross-examination well planned in advance should begin at the beginning and end at the end like all other good things. The preliminary outline should have incorporated within it, to as large an extent as possible, the sequence of matters to be followed by the cross-examiner and not merely the substance of the evidence indiscriminately arranged. There should be with it some semblance of form and regulation founded upon sound principles of psychology and common sense. If it be true then that it should begin at the beginning, then that beginning should be well planned, even more thoroughly so than the remainder, and the opening guns well pointed. It must be borne in mind, however, that in the general sense preparation for a cross-examination is limited to a certain extent within the field of the theoretical and academic. But beginning with and after the opening question is actually uttered by the counsel and taken

down by the reporter in the courtroom, then and thereafter the former's scope of action comes altogether within that of the practical. He will then have actually asked a question to which an answer is solicited and which has been sounded in the ears of the witness and the auditors; he is on his way and he will be successful or otherwise by reason of what he then and there does regardless of previous preparation or lack of it. If this preparation has been thorough and is applicable in the practical sense and the attorney is himself master of the situation with the power to make that application, he need have no fear. Accordingly the first question is, after the complete preparatory outline has been finished and revised, a matter of paramount importance because it constitutes the opening door, the beginning point from which all that follows must consecutively proceed. It is the foundation stone of a structure upon which all other stones must be laid.

The foregoing rules apply to this study as well as to the general field of cross-examination. Preparation for the selection of the first question can be separated into two distinct divisions; first before the commencement of the trial itself, or during its process preliminary to the actual taking of the stand by the adverse witness; and secondly during the direct testimony of said witness. Sometimes if attention is given to the substance of what may be expected from a given witness in counsel's preliminary outline, what first question should be propounded may be pretty definitely determined. The witness may have some weak point, or have played a particular part relative to the evidence itself, so that the proper initial interrogation may be found early in contemplation of the trial.

Let the reader not misjudge that in discussing the proper first question the intent herein is in all cases to

limit this to one all-wise or unusual and solitary interrogation. Of course the reader will readily perceive that the first question constructively may constitute a series of questions built around a given point of departure in the commencement of a cross-examination. The actual first question may be a query apparently of no importance followed by one or two others of similar character and then suddenly a third or fourth propounded which together with their predecessors complete what is here meant by the first question or the substance of the introductory thought. If there be any art in law at all beyond hard work and industry it can be found in the cross-examination of witnesses, and the first question may be likened to the first move in a game of chess, an opening, which determines the entire character of the game—a line of attack from whence all future moves must be made consistently therewith or the play is futile. The good player will observe many moves ahead and all of the anticipated turns and twists of the game must be related to its beginning.

However, in the main, the first question will be decided upon during the witness' direct testimony and counsel must be particularly alert relative to the answers given to the queries of the adverse counsel. Perhaps a vulnerable point therein may be observed, or a tendency upon the part of the witness to avoid certain matters either relating to his own personal affairs or to the evidence in chief supporting the case. No matter how much a cross-examiner has prepared himself and determined upon what his first question shall be to a given witness he must be ready instantly to discard it if upon the direct examination something occurs to alter his decision. In fact he must be so thoroughly prepared regarding the whole anticipated tenor of the case that at the last moment before the witness is turned over to him if the

testimony takes some unexpected and untoward turn he can be prompt and ready to take advantage.

The last answer on direct examination may be closely related to the first question on cross-examination. Should the adverse counsel suddenly desert a witness who has openly floundered rather than continue with the possibility of making matters worse for himself, the cross-examiner may find himself as much surprised as his opponent by such a turn of events, due perhaps to some unnecessary or supplementary response to an interrogatory. It may open a field that is brimming with possibilities for one's own client and yet again may be a trap left thus unguarded by the opposing counsel. Under such circumstances it is wise not to avoid taking up the issue, especially in a case before a jury, and yet to proceed warily and if the field is fertile with possibilities for the cross-examiner he should pursue it relentlessly, discarding all previously prepared plans for the beginning.

Frequently too, the attorney conducting the direct examination, especially when his witness' evidence is in good condition, will forswear the possibility of injuring it by continuing even though omitted pertinent questions exist. In such a case if he abruptly leaves the witness long before the cross-examiner anticipates his so doing, if the latter be not thoroughly aware of himself he will potter and flounder for several minutes losing the great advantage he could otherwise win.

This may be compared in so far as the examination of the witness is concerned with the trial itself. Very often counsel for the defense, and particularly this is true in criminal cases, will abruptly rest leaving the State with no rebuttal witnesses subpoenaed, the prosecutors having felt that the defense evidence would continue for days. While the court usually will be lenient in such an

instance still it leaves an embarrassing situation and although the jury might be sent home for the day and court adjourned until the next, if such an occurrence took place in the early morning or with the convening of court, a bad impression would be made. But in the case of a cross-examiner if the direct examination of a major witness is expected to be long and the opposing counsel turns him over thus unceremoniously, there is no hope for leniency from the court. The cross-examiner must avoid floundering and be ready to assume charge of the situation instantly.

In determining what the first question should be two courses in the main lay themselves open for consideration. One of these is to gain, if possible, the confidence and friendship of the witness. The other is to directly attempt to unnerve him and put him ill at ease. In deciding which of the two should be followed the character and personality of the witness must be taken into consideration as well as the type and character of the evidence he is expected to give.

Of the first of these two methods, namely that of placing the witness at his ease, it is frequently advisable to ask as one's first question something competent and admissible but entirely foreign or apart from the controversial elements of the case. For example, if the witness be a venerable gentleman advanced in years, of high standing and repute in his relations with his fellowmen, an unpleasant attack upon him will not result in any good to the cross-examiner. In such a case it might be wise to say, "Let us see, Dr. Blank, you were some years ago president of such and such (say here is mentioned some small university) were you not?" This would be excellent, too, if the fact had not been brought out on direct examination. It is always competent to show a man's business and his previous professional

activities and here in the atmosphere of pleasantry, although he has testified in a manner hostile to counsel's client's interest, counsel will indulge him with courtesy from the first and from thence gradually and easily gain his confidence and the extension from him of a reciprocal consideration.

Gradually the witness' mind may be drawn away from the main track and it is not necessary always to bring it back suddenly, but well planned questions can draw from him answers as nearly as possible of the nature desired by the cross-examiner.

When the witness on direct examination has gained the confidence of the jury, especially if his testimony has been in the main upon collateral issues and corroborative of some circumstance relative to the contention of the opponent, it is often wise for the cross-examiner to take advantage of this excellent impression and turn it to his client's interest. Let the atmosphere of the interrogation be one of pleasant accord with the witness and an attitude toward the jury that this witness' testimony does not prove any material fact so far as the contentions of counsel are concerned and that the witness, of course, testified only because he was compelled to do so and has himself no personal interest in the outcome of the case. Questions can be directed in such a manner as to leave this idea with the jury and further the thought that there is no quarrel between the cross-examiner and this most splendid gentleman who is upon the witness stand but rather that a bond of common understanding exists between them. Then the possibility of error in actual ability to observe with certainty this, that and the other thing, to which witness has testified can be shown in such a way that the said testimony will be made at least less damaging and not quite so injurious to counsel's client. If on the other hand the facts

related by such a witness are directly in point and tremendously damaging, a very careful study of how to first approach his cross-examination must be made and sometimes an attack upon him is necessary, however dangerous it may be.

The second plan in choosing the first question is to unnerve the witness. If this be accomplished the cross-examiner must keep always "upon his toes" and never under any circumstances permit the witness to regain his composure or "take the ball," as the saying goes, away from him. A number of illustrations of this sort of thing are found in subsequent chapters within this volume. For instance in the case of the State of Indiana v. D. C. Stephenson, one of the defense witnesses testified to a certain alleged fact. While he was not testifying as a medical expert, nevertheless a great deal of the evidence of both the prosecution and defense had come from the testimony of experts in the highly technical medical and chemical field and the jury undoubtedly felt the atmosphere thus created pervading them. The first question then asked this witness who was testifying relative to a fact alleged was, "Let us see, you are a chiropractor, are you not?" The contrast between himself and the great chemists and pathologists who had preceded him, even though their respective testimony was unrelated, prompted the question for the purpose of discomforting him. It was thoroughly competent and yet had nothing at all to do with whether or not his testimony was true or otherwise; but it fitted the occasion.

Counsel then proceeded after a few intervening questions with "Now Doctor—or is it right that I should call you Doctor?" The cross-examiner purposely appeared confused but witness was compelled to respond "No, I am not a Doctor—not under the laws of Indiana."

In another actual case a man somewhat advanced in years took the stand as one of the chief witnesses for the plaintiff. Somehow or other in the direct examination it had percolated into the evidence with no objection from the defense that he had been married four times and that each one of his wives had died, making him a widower. He was a very contentious witness and left upon the minds of those who heard him an impression that would elicit neither pity nor sympathy. His voice was rasping; his recollections were positive; his attitude was one of general hostility. On cross-examination the counsel, one long experienced in this field, paused for a time and then directed his finger to the witness, saying in a commanding voice, "State to the Court and jury the maiden name of your third wife." The witness was instantly confused, angered, embarrassed and humiliated. He reddened and before he could have had time to reply but after the intervention of some seconds, all of which passed with a deliberate rapidity in the tenseness of the courtroom, the cross-examiner said, "That's all—that's all—that's all" waving him away with an attitude of contemptuous disgust. Witness did not have the opportunity to answer the question and it was one which, when he had a chance thus to avoid answering, had he answered it, would have made him appear utterly ridiculous.

Not one time in many would such a question be effective. To make a witness appear ludicrous or to embarrass him relative to personal affairs is ordinarily bad. But the attitude and rasping personality of this man made this first and last question in the cross-examination wonderfully effective. In the argument the learned counsel was enabled to orate at some length concerning the witness who could remember every thing with utter positiveness on direct examination and yet could

recall absolutely nothing on cross-examination, not even the maiden name of his third wife.

In the case of long and extended testimony given by one witness on direct examination it is frequently wise to find something stated by him about the middle of it, which toward the end perhaps even the jury have forgotten, and when he is turned over for cross-examination without warning and out of a clear sky, as it were, to ask him some pertinent query relative thereto, giving him no opportunity to readjust his mental processes and persistently with rapid and courteous interrogations so tax his intellectual resistance that when suddenly the questions turn to some other department of his testimony he is then as much at loss as he was in the beginning.

In a recent case in which the employees of a street railway company were petitioning for an increase of wages before a board of arbitration, wherein the company pleaded lack of funds with which to pay, testimony of one of the company's expert auditors was largely consumed with showing mathematical conclusions drawn from their books. During the direct examination his counsel had seen fit to secure from him the information that the company maintained medical aid for its employees and families without charge, furnishing physicians and attention needed.

The first question then on cross-examination did not go at all to the facts and figures relative to the audit but rather directed itself to the apparently unimportant part of the central portion of his long testimony and was in substance as follows:

Q. "What proportion of the men employed by the railway company are married?"

A. "A majority of them I presume."

Q. "What proportion have children?"

A. "Most of the married ones have children."
Q. "How many doctors does the company employ?"
A. "One."
Q. "What is he paid?"
A. "$3000 a year."
Q. "Is his work confined to that required by the company or does he engage in a general practice."
A. "General practice."
Q. "Does he have any assistants?"
A. "One."
Q. "Is he an office associate?"
A. "Yes."
Q. "Does this assistant receive compensation from the company?"
A. "No."
Q. "Then he is not an employee of the company?"
A. "No."
Q. "How many men are employed by the company?"
A. "Approximately 2000."

From thence the questioning ran on showing how ridiculous it was to presume that any one doctor doing a general practice receiving $3000 a year with an office associate who was not paid by the company could care for 2000 men and their families scattered all over a big city with or without charge for his services. While in this instance the main attack intended eventually was that the conclusions of the witness relative to the audit of the company were not well founded, the witness was first placed in a ridiculous situation and in the beginning discredited and that part of his testimony shown which intended to convey a conclusion that could not be in accord with truth and fact.

It may be added in this chapter that the last question to be asked in cross-examination may become as important as the first, although not usually so much so since

the adverse attorney ordinarily avails himself of the privilege of adding omitted questions or on re-direct examination repairing some of the damage done. Nevertheless, the conclusion of such interrogations is of great importance and even though other questions might be asked the witness that could be damaging, if one has been applied to him and an answer rendered that leaves him in a very embarrassing situation, it is sometimes wise to forego pursuing the course and leave him there. This may be done abruptly or it may be done after consulting with co-counsel following which, with the gesture or wave of the hand as though the cross-examiner did not wish to further torture the witness, say "that is all." Then a re-direct examination may leave a place open through which on re-cross-examination the counsel can apply one or even two questions more damaging than the last, and thereby cause the adverse counsel to determine thereafter to let well enough alone. Thus the last question even after a long cross-examination may be made in the practical sense a silent one, more effective sometimes than any spoken word.

Frequently even attorneys of long experience, however, give no thought whatsoever to selecting the first question and will simply begin at random, asking the witness his name and residence and merely covering the general ground in the opening without attempting to gain any psychological advantage. But though preparation for either the first or last question or series of questions relating thereto can to some extent be anticipated prior to the trial they often depend upon the exigencies of the moment and must be grasped instantly.

In conclusion, in planning a cross-examination it should be anticipated as a whole from the beginning to the end and counsel be so ready for it, if any untoward

event occurs, that he can abandon his plan, having the subject-matter so well in hand that he could achieve his end without disadvantage to himself or to his client.

PART II

Examples of Cross-Examinations in Great Trials 1699-1927

CHAPTER 19

THE DUKE OF NORFOLK v. LADY MARY MORDANT

The fundamental principles of Anglo-Saxon government, law, and legal procedure have been evolved with a gradual imperceptibility from the earliest mores, habits and customs of the most remote ancestors of that branch of the human family. The hundred-moot and the hundred-man of the ancient villages buried in the forests of Germany gave first evidence of the beginning of representative authority. The witenagemot, of the time of the Saxons, was the commencement of parliamentary assemblage in England. Trials by juries succeeded those by combat, encounter or skill and gave rise to judicial determinations in controversies; and early appeals therefrom to the primitive kings, show the first thought of supreme judicial tribunals. A similar growth is traceable in the procedure in the courtroom and the principles governing proper conduct therein for they approach the present from the most ancient usages based upon the common sense of our forefathers.

It is thought advisable then in this volume to recite some few records of these early trials wherein the now acknowledged art of cross-examination originated and

to permit the reader to discover some examples therein amplifying the principles herein set out.

The first case given herewith is taken from the original text of one of the earliest reports of English state trials in the form of a bill presented to the British Parliament, which at that time as now constituted England's final and supreme adjudicating tribunal. This case was heard in the year 1699, just two centuries after the discovery of America and some four hundred years after the signing of the Magna Charta which first established by executive recognition the common law of England.

The proceedings of this trial which was the second one in the case, subsequent some years to the first, and also to the events concerning which the testimony centers, follow herewith:

CLXVIII. The Proceedings in Parliament upon the Bill of Divorce between His Grace the Duke of Norfolk and the Lady Mary Mordant, February and March, 1699, 12 Will. III.

VIZ.

I. The Journal of the House of Lords, together with the Bill.

II. Depositions before their Lordships.

III. The Examination and Evidence of the Duke's Witnesses.

IV. The State of the Case on both Sides.

V. Bishop Cousen's Argument, proving that Adultery causes a Dissolution of Marriage.

VI. The Pleadings of the Learned Counsel, before the Honourable House of Commons, and the Committee, with other Matters thereto relating.

Die Jovis 15 Februarij, 1699.

Upon reading the Petition of Henry Duke of Norfolk, praying Leave to bring in a Bill to dissolve his Mar-

riage with the Lady Mary Mordant, and to enable him to Marry again, he having certain Proof of his Wife's living in Adultery with Sir John Germaine: It is ordered by the Lords Spiritual and Temporal in Parliament assembled, That the said Petition shall be taken into Consideration Tomorrow, at Eleven of the Clock, and all the Lords summon'd to attend.

Die Veneris 16 of Februarij, 1699.

After reading the Order for resuming the Consideration of the Duke of Norfolk's Petition, and Debate thereupon;

Hodie prima vice lecta est billa entitled, An Act to dissolve the Duke of Norfolk's Marriage with the Lady Mary Mordant, and to enable him to Marry again. In the Words following,

Humbly sheweth, and complaineth to Your most Excellent Majesty, your true and faithful subject Henry Duke of Norfolk, and Earl Marshall of England, That he did some Years since, marry the Lady Mary Mordant, his now Wife; and, that she hath, for divers Years, lived in separation from the said Subject, and hath had unlawful Familiarity and adulterous Conversation with Sir John Germaine, Bart. and is guilty of Adultery on her part, and hath broken the Bond of Matrimony. Forasmuch therefore, as your said Subject hath no Issue, nor can hope for any other than spurious issue to succeed him in the Honours, Dignities, and Estate, unless the said Marriage be declar'd void, and annull'd by Parliament, and your said Subject be enabled to marry any other Woman. May it please Your most Excellent Majesty, out of your Princely Goodness and Compassion to your said Subject's Misfortune and Calamity, and for the future Support and Comfort of himself and Family, that it may be enacted: And be it enacted by the King's most Excellent Majesty, by and with the Advice and

Consent of the Lord's Spiritual and Temporal, and of the Commons in this present Parliament assembled, and by the Authority of the same, That the said Bond of Matrimony being violated and broken by the manifest open Adultery of the said Lady Mary Mordant, Be, and is hereby enacted, declared, and adjudged to be from henceforth wholly dissolved, annulled, vacated and made void to all Intents, Constructions, and Purposes whatsoever: And, that it shall and may be lawful to and for the said Henry Duke of Norfolk, at any time or times hereafter, to contract Matrimony, and to marry (as well in the Life-time of the said Lady Mary, as if she were naturally dead) with any other Woman or Women with whom he might lawfully marry in case the said Lady Mary was not living: And, that such Matrimony, when had and celebrated, shall be a good, just, and lawful Marriage, and so shall be adjudged, deemed, and taken to all Intents, Constructions and Purposes; and, that all and every Child and Children, born in such Matrimony, shall be deemed, adjudged, and taken to be born in lawful Wedlock, and to be legitimate and inheritable, and shall inherit the said Dukedom of Norfolk, Office of Earl-Marshal of England, and all other Earldoms, Dignities, Baronies, Honours, and Title of Honour, Lands, Tenements, and other Hereditaments from and by their Fathers, Mothers, and other Ancestors, in like manner and form as any other Child or Children born in lawful Matrimony shall or may inherit or be inheritable, according to the course of Inheritance used in this Realm; and to have and enjoy all Privileges, Pre-eminencies, Benefits, Advantages, Claims, and Demands, as any other Child or Children born in lawful Wedlock may have or claim by the Laws and Customs of this Kingdom. And be it further enacted, That the said Henry Duke of Norfolk shall be entitled to be Tenant by Courtesie of the

Lands and Inheritance of such Wife whom he shall hereafter marry.

The issues thereafter being closed, followed by the statements of the counsel, the testimony of the first witness was then rendered in support of the Duke's condition. This witness Elianor Vaness, a former servant of the Duchess of Norfolk (or Lady Mordant) and Sir John Germaine had been sent to Holland, evidently first by Sir John for the purpose of avoiding the necessity of testifying in the first trial, and now brought back again apparently by the Duke of Norfolk for the purpose of requiring her to give said evidence in the present trial. Foreign of birth and speech it was necessary for her language to be interpreted. Her deposition taken from the record of the case in itself gives further a fairly accurate account of the alleged misdoings of the Duchess together with Sir John Germaine upon which the Duke based his contentions. Though the purpose of this volume is to display examples of cross-examination applicable to the principles thereof hereinbefore set out, nevertheless in order to present to the reader a full and complete comprehension of the controversy involved in this trial, the entire testimony of the aforesaid Elianor Vaness is here given with both direct- as well as her cross-examination therein. Her testimony follows:

Depositions of Elianor Vaness.

Die Fovis 22 Februarij, 1699.

Elianor Vaness sworn, Deposeth as followeth, (viz.)

Q. "D'ye know Sir John Germaine and the Dutchess[1] of Norfolk?"

A. "Yes."

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[1] Note throughout old English spelling and manner of printing.

Q. "How long have you known them?"

A. "Two years."

Q. "When did you first come acquainted with them?"

A. "Sir John Germaine's Sister hired me for a Cook-maid the Summer after the King came for England."

Q. "In what Month of that Year?"

A. "In May."

Q. "Did you live with either of them as a Servant-Maid?"

A. "I lived two Months with my Lady Dutchess, in Sir John Germaine's House."

Q. "How long did you live in the House with them?"

A. "Till they went to Vaux-hall."

Q. "How long was the Dutchess in the House before they went to Vaux-hall?"

A. "Two Months."

Q. "Where was that House?"

A. "Just over Spring-Garden."

Q. "At the time when the Lady Dutchess lived with Sir John Germaine, what Company and Conversation did they keep with one another? And in what Manner?"

A. "Like Man and Wife."

Q. "Where was it the Lady Dutchess lived when you came first into England?"

A. "In Sir John Germaine's House."

Q. "Where did she live then?"

A. "The Dutchess lived there then."

Q. "How long continued she there?"

A. "About two Months."

Q. "How did they live together during That Time?"

A. "Like Man and Wife."

Q. "Saw you them in Bed together at any Time, at the Place in the Cockpit?"

A. "Yes."

Q. "How often?"

A. "Many times; as often as Man and Wife she saw them in Bed, but did not put them in bed those Months."

Q. "Did you think any otherwise, but that they had been Man and Wife?"

A. "She did not at first, but afterwards she did; and then they kept her within Doors, for fear she should tell it."

Q. "Whither did the Dutchess go after that two Months?"

A. "To Vaux-Hall."

Q. "How long did she live there?"

A. "About two Years."

Q. "Did Sir John Germaine use to come and keep Company with the Dutchess there?"

A. "Yes; he used to come and dine with her sometimes; and he lay there sometimes."

Q. "What conversation had Sir John Germaine with the Dutchess at Vaux-Hall?"

A. "They convers'd together as Man and Wife."

Q. "How long?"

A. "Sometimes one Night, and sometimes two."

Q. "How often did he use to come thither?"

A. "Sometimes twice, sometimes three times a Week, and sometimes but once."

Q. "Had they one Bed, or two?"

A. "But one."

Q. "What name did the Dutchess go by at Vaux-Hall?"

A. "By the Name of the Lady Beckman."

Q. "What Kin was Sir John Germaine pretended to be to the Lady Dutchess?"

A. "Her Brother; my Lady Dutchess said so."

Q. "Did you go with them to Vaux-Hall, or not?"

A. "She went with the Lady Dutchess."

Q. "Whose Servant was you there?"

A. "Lady Dutchess's."

Q. "How long did you serve the Lady Dutchess?"

A. "She staid with her till she went to Mill-bank."

Q. "How came you to leave their Service?"

A. "They sent her away upon the Account of the late Trial."

Q. "Who went with you?"

A. "Mrs. Susannah, Chambermaid to the Lady Dutchess; and Mr. Nicholas, that was Gentleman to Sir John Germaine."

Q. "What's his name?"

A. "Nicholas Hosier."

Q. "Who took care of your passage?"

A. "Nicholas Hosier."

Q. "Whither was you order'd to go?"

A. "To Holland, to the Hague: They paid her in full, and promised fifty Livres besides."

Q. "Was any Part of it paid? and by whom?"

A. "She receiv'd it in four Quarters, from his Brother Philip, at the Hague."

Q. "Whose Brother?"

A. "Sir John Germaine's Brother."

Q. "Who hired you when you came to England?"

A. "Mr. Briane's Wife."

Q. "What Kin is she to Sir John Germaine?"

A. "His Sister; and they promised, if Matters did not go for the Dutchess, she would come to Holland herself, and take her into her Service again."

Q. "Have you seen Sir John Germaine and the Dutchess in Bed together at Mill-bank?"

A. "Once or twice."

Q. "How long had the Lady Dutchess lived at Mill-bank ere you left her Service?"

A. "Nine or ten Weeks."

Q. "How came you to see them in Bed together?"

A. "By reason none was suffer'd to come into the Room, the Bedchamber, but she and another Maid, to bring Necessaries, as Water to wash their Hands, and to clean the Room."

Q. "Did you see them at their undressing, when they went to Bed?"

A. "She undressed them herself, and saw them in Bed."

Q. "Give an account how you two came to be admitted into the Chamber and what you saw there."

A. "She help'd them to Bed, and saw them go to Bed together."

Q. "Saw you them next Morning?"

A. "Yes."

Q. "On what Occasion came you into the Chamber in the Morning?"

A. "She came with Chocolate, and Water to Wash their Hands."

Q. "Did you ever see Mr. Nicholas Hosier there?"

A. "Yes; he did the business that she did when she could not be present; he was Valet de Chambre."

Q. "Was he Valet de Chambre to Sir John Germaine, or to the Dutchess?"

A. "He belonged to the Dutchess at Vaux-Hall, and afterwards to Sir John Germaine."

Q. "Came he to Sir John Germaine before the Lady Dutchess went to Vaux-Hall, or not?"

A. "The Dutchess was at Vaux-Hall when he came to Sir John Germaine."

Q. "Who lived with the Dutchess at Vaux-Hall?"

A. "Sir John Germaine's sister."

Q. "Who hired you?"

A. "Mrs. Briane, Mr. Briane's Wife."

Q. "Was there no other Relation of Sir John Germaine's that lived there besides?"

A. "Mrs. Judith."

Q. "What Mrs. Judith? What's her Name?"

A. "She does not know."

Q. "What kin was Mrs. Judith to Sir John Germaine?"

A. "His Sister."

Q. "Did the Dutchess use to go to no other Place?"

A. "None but to the neighbouring Gardens, to gather Flowers."

Q. "When you were at Mill-bank, did you ever see the Dutchess's Father?"

A. "She hath been several times at the Dutchess's Father's, and the Lady Dutchess told her Father and Mother, that she brought her from Holland; she dress'd three Dishes of Meat by Order of the Dutchess."

Q. "Who was the Lady Dutchess's Father? Where did he Live?"

A. "He lived at Mill-bank, but could not tell his Name; the Lord Peterborough she says, but could not think on't before now."

Q. "When she lived with Germaine at the Cockpit, was there no other that lived with them at that Time?"

A. "Nobody."

Q. "Did Sir John Germaine's Brother-in-Law or Sister lie in the House at any time?"

A. "Yes; when they came first to England they used to lie there."

Q. "Name them?"

A. "Mr. Briane, and his Wife."

Q. "Did you see any of Sir John Germaine's Relations, at any time, in the Room during the Time that the Dutchess was in Bed with him?"

A. "Yes, Mr. Briane and his Wife."

Q. "Was Sir John Germaine in Bed at that time with the Dutchess?"

A. "Yes."

At this point the witness was turned over to opposing counsel for the purpose of submitting to cross-examination.

Elianor Vaness' cross-examination. Feb. 22, 1699.

Q. "Was it at Vaux-Hall that the Lady Dutchess said, That Germaine was her Brother?"

A. "Yes."

Note here that the cross-examiner supported one of the principles set down heretofore in this volume by abruptly and unexpectedly selecting one of witness' apparently unimportant statements and by attacking her thereon. He then pursued her with interrogations covering the whole of her testimony but without following any sequence that would enable her to be upon her guard.

To continue:

Q. "Did the Dutchess tell you, that Sir Germaine was her Brother?"

A. "She gave it out among the Neighbors, but never told her so."

Q. "Was you Cookmaid?"

A. "She was hired for Cookmaid."

Q. "Did you continue to act as Cookmaid?"

A. "Yes, at Vaux-Hall."

Q. "Was you at the Cockpit?"

A. "She used to clean the Rooms, and nobody was suffer'd to come into the Room but she, Mrs. Susannah, and Nicholas."

Q. "Was there no other Woman in the House but you?"

A. "Yes, Mrs. Susannah."

Q. "Where did you see Sir John Germaine and the Dutchess in Bed?"

A. "At Vaux-Hall."

Following this question the cross-examiner spent most of his time interrogating the witness concerning herself rather than the evidence she might have been able to give relative to the facts in the case. The reader will observe the inferences being drawn were that she had been brought back from Holland for the sole purpose of testifying against the Dutchess and that she would profit thereby; that she was dependent upon the Duke's purse either directly or indirectly, and that her story was somewhat inspired.

Q. "When came you from Holland?"

A. "About five or six Weeks ago?"

Q. "Where have you been since?"

A. "She does not know no Place nor Street in London."

Q. "How came you over?"

A. "About a Year and half ago she met Nicholas at Amsterdam; she ask'd him how he did, and if he had got a Place. He answer'd No; but he believ'd he should very soon have one in England."

Q. "Who sent for you, or brought you over from Holland this last Time?"

A. "She met Mr. Nicholas about a Year ago, and said, She had a great mind to go and live in England again; and he said, He would get a Place for her."

Q. "Who sent for her?"

A. "Does not know."

Q. "When you came over, who paid your Passage, and first took Care of you?"

A. "Nicholas hath given her what she spent since."

Q. "Who brought you to Town? And who furnish'd you with Money? And where did you land? What house did you first come to?"

A. "She landed at Gravefend."

Q. "Who received her there; or, when she came to Town, brought her to any Place to lodge at?"

A. "Nicholas brought her to a Place where she was secure."

Q. "What Place is it?"

A. "She does not know, she never was in London."

Q. "Did you live at Vaux-Hall, and at Sir John Germaine's House in the Cockpit?"

A. "She was no further than those Houses; she means, she was never in the City of London."

Q. "Where is the House she has been at these six Weeks?"

A. "She can't tell whereabouts it is."

Q. "Was you not sent for back from Holland to be a Witness?"

A. "No, knew nothing of it till about—Now about eight or nine Weeks ago."

Q. "In what Street is the House you have been at?"

A. "I can't tell."

Q. "How long is it since you went into Holland, since you left the Dutchess's Service?"

A. "About eight years ago."

Q. "Did you never tell anybody the Occasion of your going over?"

A. "Yes, in Holland, but not here."

Q. "Know you any of those to be in England that you did tell it to?"

A. "Does not know any."

Q. "Did you ever discover this Matter of your own accord? or, Was you ask'd to do it?"

A. "I said, I would tell the Truth if I were asked."

Q. "Can you name the Person that ask'd you?"

A. "Mr. Nicholas."

Q. "Had you any discourse about this Matter about eight Weeks ago?"

A. "When I asked Mr. Nicholas if he could get me a Place in England, I told him I would say the Truth."

Q. "What Discourse had you with Mr. Nicholas about it?"

This is right up-to-date. It could not be better if the original question had been framed, "To whom have you talked concerning this case?" The remainder of the examination followed this idea.

A. "I asked Mr. Nicholas, whether there was any danger of any such Thing? He said, He knew nothing of it."

Q. "Did you ever discover that you were sent out of the Way, into Holland?"

A. "No."

Q. "Whether you and this Gentleman that interprets have not talk'd most of this Matter before you came hither?"

A. "No."

Q. "Who have you talk'd to about this Matter, since you came into England, besides Nicholas?"

A. "Nobody."

Q. "Are you a Single Woman, or a Married Woman?"

A. "A single Woman."

The next witness, Nicholas Hosier, was sworn and directly examined on the 22nd day of February 1699, the substance of his testimony being as follows: that he had served as a servant to Sir John Germaine about the time of the first trial and theretofore; that Sir John and Lady Norfolk had lived together as man and wife during that time; that he, the said witness, therein went out of the service of Sir John Germaine at the previous trial of the Duke of Norfolk against Lady Mary Mordant and at that time had gone abroad and into Holland, Sir John

having given him money to so do. A portion of the direct testimony is as follows:

Q. "What become of Vaness and yourself afterwards?"

A. "When the Wind favoured we passed the Seas."

Q. "What time of the Year was it?"

A. "It was about Easter that he came into Holland."

Q. "What time he went from his service and was ordered to be private?"

A. "It was about the time of the Trial."

Q. "Whether he hath any Paper under Sir John Germaine's Hand for his discharge? We do not ask it but only to refresh his memory."

A. "The paper was dated Eighth of February, One thousand six hundred ninety-two, reckoning the year to begin the first of January."

Q. "Whether that was the Time he left the Dutchess' Service?"

A. "Yes about six or eight weeks after he went to sea."

Then later in the testimony.

Q. "Whether after he came back in the year One thousand six hundred ninety-two, he observed any conversation between Sir John Germaine and the Dutchess?"

A. "Yes he says he saw them come together at their House."

Q. "What more?"

A. "He again then saw them abed together."

Q. "Where?"

A. "In the House of Sir John Germaine."

Q. "How often may that be?"

A. "He can't justly tell how often."

Q. "Whether it was often or not?"

A. "No, he can't say very often."

Q. "When was the last time he ever saw them abed together?"

A. "The last time he saw them abed was not at the Cockpit."

Q. "Where then?"

A. "It was at the Dutchess's own House, where, as he believes, she lives still."

Q. "Whereabout in the Town?"

A. "It was upon a corner of the Park, near my Lord of Oxford's."

Q. "How long since he saw them last abed together?"

A. "He can't justly tell the Time, it was about two or three months before he went away the last time."

Q. "In what year did he go away the last time? (Let him look upon any note he hath to refresh his memory.)"

(Accordingly he look'd upon a Paper.)

A. "'Tis the Twenty-seventh of April, One thousand six hundred ninety-six."

And then again:

Q. "When my Lady Dutchess lived at Vaux-Hall, whether he can name anybody else that was a Servant in the House at that Time?"

A. "Yes, there was one Elianor Vaness."

Q. "What Servant was she?"

A. "She looked into the Kitchen."

Q. "Whether he has seen her in the Chamber when the Dutchess was abed there?"

A. "Yes, very often."

Cross-Examination:

Q. "I desire he may reduce this to a Certainty, what time he went out of England, and look upon his Note again."

(He look'd upon his Note, and 'twas dated Eighth February, One thousand six Hundred ninety-two.)

Q. "How long after this went he out of England?"

A. "He went away as soon as the Wind was favourable."

Q. "Can he recollect the time?"

A. "He says 'twas some time before Easter, for he came into Holland about Easter."

Q. "When he told his Grace the Duke of Norfolk and Lord Howard he would be true to them, whether he was in any Service at that Time?"

A. "No, he was in no Service at that Time."

Q. "How long had he been out of Employ?"

A. "He has none yet."

The inference being drawn here by the counsel cross-examining is that the witness was attempting to hold out to the Duke of Norfolk that he would testify for him hoping in return therefor material assistance from said Norfolk; that the fact that he was out of employ only exaggerated the necessity of his bargaining with someone if possible.

Q. "But how long had he been out of Employ, or Service, before he made this Proposal to the Duke, or my Lord Howard?"

A. "He says, he went away about the Twenty-seventh of June."

Q. "Is it the same Year his Paper speaks of, that he spake to my Lord Duke?"

A. "No, 'twas not; he spake to my Lord Duke about twelve Months ago."

Q. "But how long had he been out of Service when he spake to my Lord Duke? When did he leave Sir John Germaine the last Time?"

A. "'Tis about three Years and half ago; 'twill be four Years in June next."

Q. "Has he been in any Service since that Time?"

A. "No, he hath not."

Q. "How has he lived since then?"

A. "He says he has something of his own in his own Country, upon which he may subsist some time."

Q. "I think he said, he saw Sir John Germaine and the Dutchess in Bed together, in the House where she now lives?"

A. "Yes."

Q. "Then I desire he will tell, if he knows any of the Dutchess's Servants that were about her at that time."

A. "Yes, he does."

This was for the purpose of obtaining contradictory statements from whoever may have been present at this same time if possible. At least it afforded the counsel for Lady Norfolk with an opportunity to check up on the story of this witness.

Q. "Then, that he will name them?"

A. "Henry Keemer."

Q. "What's become of him?"

A. "They told he was dead; and there was Susan Barrington."

Q. "I desire he will tell of some of the Servants that lived with the Dutchess at that Time, besides that Person that is dead, and the other which is gone beyond Sea, as they say?"

This question introduced an adroit sarcasm with the indirect suggestion that witness only mentioned the names of those whose testimony was unavailable to corroborate him.

Mr. Northey Answer'd. "We don't say she is gone beyond Sea."

A. "He does not know any other."

Q. "Then, that he will tell what Month he saw them in Bed together?"

Here the time and place were being sought by the cross-examiner which again placed the witness upon the

defensive and was an attempt to open the door toward checking his story.

A. "He can't remember the Month, or the Day; but if they will ask him the Reason why he remembers it, he will tell it them."

Q. "If you can come to any certainty about the Time of the Year, or the Month?"

A. "He can't say the Month, or any particular Time."

Q. "What Servant he saw in the House, or who let him in?"

A. "He had himself the Key of the lower Room, and could come in when he pleas'd."

Q. "Whose Servant was he at this Time he speaks of? Whether he was a Servant to the Dutchess or to Sir John Germaine?"

A. "He was Servant to Sir John Germaine."

Q. "He was saying he could tell a Reason to fix the Time, let him recollect himself of the Time?"

A. "He can't remember the Time, but he came into the Room to bring a Clyster, and he was desired to stay a little till my Lady Dutchess got up."

Q. "That he may be positive whether he had a key to the lower Room of the Dutchess's House."

A. "He says he had a Key to the Door that goes into the Park, and he could come into the House by it; for it was the Key of the House."

Q. "What Servant was it that brought him up, for that Key only let him into the lower Room?"

A. "Sometimes Susan Barrington, and sometimes Henry Keemer."

Q. "What Room the Lady Dutchess lay in?"

All of these questions tended to test the veracity of the witness by making him describe details which if he were

telling the truth would come readily to his mind and if he were not, would leave him hopelessly bewildered.

A. "'Tis a Room that looks into the Park."

Q. "'Tis not a Ground-Room, I suppose?"

A. "No, 'tis up Stairs."

Q. "How many stories?"

A. "He can't tell what Degree it was."

A. "Being ask'd that Question again upon the reading his Depositions, he says he can't tell how many Stories; but, if you please, he will describe the coming into the Room as well as he can."

Q. "Describe the Coming into the Room."

A. "That as you come upon the left Hand, there is a Way to go into the Dutchess's Room; when you have passed the little Chamber-door, you go into a Place full of China; and, after that, you come to the Dutchess's Bed-Chamber. On the other side, going up Stairs, there is a little Room, where Susan told him she lay; and afterwards you come into a Room where the Chimney is, as he thinks, on the right Hand, and he thinks there are two Windows that look into the Street, he is not very certain; and in the Room upon the left Hand there is a Door into a great Room, and from the great Room you can go into the Lady Dutchess's Room. It was so at that time, to the best of his Remembrance."

Q. "How many Rooms are there upon a Floor?"

A. "There are a matter of four Rooms upon a Floor."

Q. "Whether he has spoke with any body that he knows is acquainted with this House since he was examined here before?"

A. "He says he has spoke to nobody since, that has given him any Account of the House."

Q. "Which Side of the Park does the Window of my Lady Dutchess's Room look into?"

A. "Towards the Pond where the Brass Statue is."

Q. "Does the Bed-chamber look towards the Brass Statue?"

A. "He durst not go to look out at the Window for fear of being discovered, but he could see the Water."

Q. "Whether he knows the Horse-Guards?"

A. "Yes."

Q. "Whether he knows Arlington-House?"

A. "Yes."

Q. "Whether the Window does look towards Arlington-House, or the Horse-Guards?"

A. "He hath been there several times, but it was not his Business to go to the Window; but when he was in the Room he could see the Water."

Q. "Whether he could tell which Way the Window look'd?"

A. "He did not live in the House, but went there sometimes upon Messages; and when he was there, 'twas not his Business to go to the Window, but he could see the Water when he was in the Room."

Q. "Whether the Window was on that side of the little Door that he came in, or on t'other side?"

A. "Upon the left Hand coming in. He says he has explained himself as to the entering in, and he can say no more to it."

Q. "Was it one or two Pair of Stairs that the Dutchess lay?"

A. "He can't be positive, whether one or two Pairs of Stairs."

Q. "Who brought him up that Time he brought the Clyster?"

A. "Susan Barrington."

Q. "Who told him, at the Cock-pit, 'twas the Dutchess of Norfolk?"

A. "Sir John Germaine, herself, and the whole House told him so."

Q. "Did he before that Time know the Dutchess?"

A. "No."

Q. "Did you never see other Women there besides this Lady?"

A. "Yes."

Q. "Did you know all the rest that you saw there?"

A. "No, he did not know them all."

Q. "Whether he was not told the rest of the Women were of great Quality too?"

A. "He never was told so, nor did he inform himself whether they were or nor."

Q. "At Vaux-Hall, and at the Cock-pit, I think, he spake as if he undress'd Sir John Germaine and the Dutchess; whether he undress'd them both?"

A. "Not the Dutchess."

Q. "What year was it they were at Vaux-Hall?"

A. "It was before he went to Ireland, and after he came from Ireland; but he can't precisely tell the Time."

Q. "Whether he has been in any Service since One thousand six hundred ninety-six, when he left Sir John Germaine's?"

A. "No."

Q. "Whether when he came, about a Year ago, into England, there was Application made to him in order to make a Discovery? or, whether he offer'd of himself to make it.

A. "He never did offer himself."

Here again the questioning attempted to convince the Judges in the case that this witness had sold his testimony to the Duke either directly or indirectly.

Q. "Who was it that first ask'd him the Question?"

A. "'Twas my Lord Howard."

Q. "Where did you meet my Lord Howard? And upon what Occasion?"

A. "He says, That 'twas that Person that he had address'd himself to, to get into Service here, that was the Occasion of their meeting together."

Q. "Did you know the Lord Howard before?"

A. "No."

Q. "Where was the Place they met?"

A. "He call'd him to his House."

Q. "My Lord, or that Person?"

A. "He says, That Person to which he address'd himself to get a Place, told him he had found one."

Q. "Name that Person."

A. "Richardson."

Q. "Where does he live?"

A. "I don't know."

Q. "Were you acquainted with him before?"

A. "Yes."

Q. "Where had you been acquainted with him?"

A. "At London; 'tis a Woman."

Q. "Whether he can describe the Room, or the Furniture of the Room, where this Noble Lady and Sir John Germaine were a-bed together, where she lives now?"

Counsel abruptly left the previous line of questioning and made a sudden and direct attack upon the memory of the witness.

A. "He can't remember any thing of the Furniture."

Q. "Was it hung or wainscoted?"

A. "He says, he can't tell, and yet was there often."

Q. "Pray, who was the Clyster for?"

A. "For Mr. Germaine."

Q. "Where was it to be administered?"

A. "A-bed."

Q. "Who was a-bed?"

A. "My Lady Dutchess was a-bed too."

Q. "Was it to be administered at the same time as he and the Dutchess were a-bed together?"

A. "No."

Q. "Was the Dutchess there?"

A. "He laid the Syringe to the Fire-side, till such time as the Dutchess rose."

Q. "Apothecaries are exact in point of Time in making their Bills."

A. "He says, I composed the Clyster myself; but he did not compose it at the Dutchess's house, but at Mr. Germaine's."

Q. "Did you stay with Sir John Germaine till all was over?"

A. "No; as soon as he had given it him, he went home to Mr. Germaine's House."

Q. "Whether he pretends to speak of any other Time he saw the Dutchess in Bed with him at her House in Duke-Street, but when he carried him the Clyster?"

A. "Yes, he says he has."

Q. "Let him tell the Times and Circumstances."

A. "He says, he can't very well remember the Times, but he had sometimes Business there, to bring and carry Letters."

Q. "When was that Time of the Clyster?"

A. "It was about two Months before he left them."

Q. "Was that the last time he saw them together?"

A. "That was the last Time."

Q. "How long before that did he see 'em together?"

A. "Long before that Time, in the same House."

Q. "He says, he has seen Sir John Germaine and the Dutchess in Bed together elsewhere. Did he never see them in Bed together at the Mill-Bank?"

A. "He has seen them there two or three Times a-bed together."

Q. "When did your master order you to prepare a Clyster?"

A. "He had Order to come and wait for Mr. Germaine at the Dutchess's; and that Mr. Germaine coming to the Dutchess's late, he ordered him to bring the Clyster next Morning."

Q. "At what time he came the next Morning?"

A. "He had Order to bring it at 9 a-Clock, and he brought it at the appointed Hour, and waited in the little Room where Susan was till he was call'd in."

Q. "He says, he waited for Sir John Germaine, by his Orders, at the Dutchess's, 'till 'twas late; which of the Dutchess's Servants did he keep company with?"

A. "He says, he remembers very well it was Mr. Keemer."

Q. "Whether that time that he saw Mr. Germaine and the Dutchess in Bed together at Mill-bank, if it was after the first time he was sent out of England, when the Bill was depending before the Lords?"

A. "'Twas after."

Q. "What Year did you see them a-bed together at Mill-bank?"

A. "'Twas a day or two before Mrs. D'Avenant died. A day or two before she died Mr. Germaine came to Mill-bank, and staid there about eight Days."

Nicola Hauseur, Deposition.

In the following cross-examination none of the direct testimony relative thereto having been given, the reader is left to interpret from the record itself the purport of the questions and answers which are fairly self-explanatory. They constitute the evidence of witnesses who were supporting either the Duchess or Sir John Germaine as against the Duke of Norfolk. First in order

comes William Bailey, then John Peacock and finally William White, all servants of Sir John.

As indicated the cross-examinations only are shown.

DEPOSITIONS OF WILLIAM BAYLY.

Die Sabbati 25 Februarij, 1699.

(William Bayly Sworn)

Cross-Examined Lunae 26 Februarij, 1699.

Q. "When you carried the Cloaths to Sir John Germaine's, was it the Time when you wore his Livery?"

A. "I carried no Cloaths to him when I wore his Livery."

This began with a sudden attack and unexpectedly upon an unimportant part of the witness' direct testimony and then abruptly swung itself into an assault upon the witness himself, leaving the impression that his evidence has been bought and paid for by those this time opposed to the Duke of Norfolk. The witness however took care of himself very well.

Q. "Had you no Discourse with the Dutchess's Agents since Saturday Night?"

A. "No, I have not seen them, nor don't know them."

Q. "He says, he saw the Dutchess of Norfolk at the Cockpit, at Sir John Germaine's House where he now dwells: Pray, recollect yourself, that you may be positive as to the Time."

A. "I can't resolve you as to the Year, 'tis so long ago; I believe 'tis about five Years ago."

Q. "Can you be positive that it is not more?"

A. "To the best of my knowledge, 'twas about five Years."

Q. "Can you be so far certain, that you can say 'twas not more?"

A. "I can't swear 'twas more, but I believe it may be five Years, more or less."

Q. "You say you saw her two or three times there: Was it all in one Year, near the same Time or Month? Can you reduce it to any Certainty?"

A. "I believe it might be in summer."

Q. "All in one summer?"

A. "Yes, I believe, all in one; to the best of my knowledge there was never a Winter between the Time that I saw her first and last."

Q. "Did you know the Dutchess of Norfolk before that Time that you saw her in your Master's House, and took her to be the Dutchess of Norfolk?"

A. "I did not know her before the Trial was here."

Q. "Did you know her at any Time after that Trial, before the Time you saw her in Sir John Germaine's House?"

A. "I was not sure that it was she, only as I had it from Mr. Keemer."

Q. "Then you don't undertake of your own knowledge to say that it was she?"

A. "I can't swear that 'twas she, but Mr. Keemer told me; I don't know whether I should know her now or not, 'tis so long since I saw her; I believe it is five Years, if not more."

Q. "Did you see her before or after you saw her at Sir John Germaine's House?"

A. "The first time they told me 'twas she, I met her in her Coach in the Pallmall, with two other Gentlewomen with her, a little before the Trial was here: I followed the Coach, and the Dutchess went into some Lady's House in Dover-Street, and they told me the Dutchess was the first Woman that went out; this is the first time that e'er I saw her, that I know of, 'till such time as Keemer told me 'twas she."

Q. "Whether do you know Nicholas?"

A. "I know him very well."

Q. "Can you tell how long it is since he came last into England?"

A. "No, he has been here two or three times in England since I left my Master."

Q. "How long before this Examination saw you him, or spoke with him?"

A. "I did not see him above these three Years."

Q. "How long before you came hither as a Witness did you see him?

A. "I have not seen him these three Years till I came hither to be a Witness, and did admire to see him here, that a Man that had got his Bread under his Master should appear here against him, it is so ungrateful a thing."

Here the witness showed his contempt for Nicholas who had testified for the Duke and against his old master Sir John Germaine.

Counsel for the Duke, however, were not to be drawn aside—a good rule, heretofore set down—and they permit it for the moment to pass, continuing their effort to impugn the witness' motives.

Q. "How came you had so much Curiosity as to follow the Dutchess Coach?"

A. "I had a Mind to satisfy my own Humour."

Q. "D'ye know how Nicholas lived since he was out of his Master's Service?"

A. "No; I never saw him, nor had any Account of him at all, nor have seen him these three Years till now."

Q. "Did you know when Nicholas and Elianor Vaness went out of England?"

A. "No, I never knew when they went, nor when they came."

Q. "Don't you know what Business he went out of England about, the Time you took his Place."

A. "I know not the Business he went out of England upon."

Q. "Did he at any Time tell you he was to get away to hide himself from coming hither?"

A. "No, I heard not one Word from him at the Time of his parting."

Q. "What reason had you to say upon the first Sight of Hosier, that he was ungrateful for coming hither?"

Here the Duke's counsel swung back into an attack upon witness for his previous display of temper toward Nicholas.

A. "I should think myself ungrateful to eat a Gentleman's bread seven Years, and do him all the Spite and Malice I could."

Q. "Repeat those Words."

A. "I should think myself very ungrateful to prosecute; if I should do any Harm to a Master that I had served so many Years, I should think myself very ungrateful, let him think of himself what he pleases."

Q. "He added some other words."

A. "For any thing I know, it is Spite and Malice."

Q. "Where did you live when you followed the Dutchess's Coach?"

A. "At Mr. Germaine's."

Q. "This Man is a Witness, and so is Hosier; let him explain himself what he means, and wherein there is any Difference between him and Hosier, for both are Witnesses?"

A. "I say, I should think myself very ungrateful, if I would do any Harm to a Man whose Bread I did eat so long, and had got so much Money under him."

Q. "What harm does Hosier do, being a Witness against the Dutchess of Norfolk? What harm is that to Sir John Germaine?"

A. "I don't know."

Q. "D'ye reckon it ungrateful to speak the Truth to the Prejudice of a Master?"

A. "No, I would not speak an Untruth for all the Masters in the World."

Q. "Where is there any Fault more in Hosier than in you?"

A. "I know not."

Q. "Whether did Elianor Vaness live with Sir John Germaine when you liv'd there?"

A. "I know not who she is."

Q. "This woman that was here as a Witness?"

A. "Yes, she liv'd there."

Q. "What time went she away from Sir John Germaine's Service?"

A. "I know not, I can not tell, indeed."

Sign'd,
William Bayly.

Die Lunae, 4 Martii, 1699.

John Peacock sworn, deposeth as followeth:

Cross-Examined:

Q. "Where do you live now?"

A. "New Huntingdon: I board in a House there."

Q. "How long have you been out of service?"

A repetition of the old idea of showing witness' poverty and that he must be loyal to the Dutchess or she will not financially aid him.

A. "Ever since I left my Lady Dutchess."

Q. "How do you live then?"

A. "I board in a House; I follow no Employment, but live on my own, except to teach Children, two, three, or four, out of Charity."

Q. "When came you to the Dutchess's Service first?"

A. "I served her about ten or twelve Years ago; but I can't remember the precise time, 'tis so long since."

Q. "How long did you live with her then?"

A. "I lived with her about half a Year at Drayton in Northamptonshire; I went about November, and staid to Lady-Day following."

Q. "How long was it before you came to live with her the last Time?"

A. "I can't tell."

Q. "You say you came to live with her about two Years and a Quarter; what Time was that?"

A. "I can't tell, but that may be easily found; I liv'd with her about six Years ago, or thereabouts."

Q. "How long did you leave the Dutchess, after the Hearing came on in this Noble House?"

A. "I don't know; it was about a Year and three Quarters, or two Years, I can't be positive."

Q. "Was it after the Trial began?"

A. "Yes, I think the Trial began in January, and 'twas a year after it began."

Q. 'Can't you be positive what Time you came to live with the Dutchess?"

A. "I came about August to Mill-bank, but the Dutchess was not come then; but the October following my Lady Dutchess came."

Q. "Where did the Dutchess live then?"

A. "I don't know, I was at the Lady Peterborough's; I help'd her Servants to carry Things, and to get Things ready."

Q. "Did you know where the Dutchess liv'd then?"

A. "No; some said she liv'd in Flanders, others in Holland, and some in France."

Q. "Was you ever at Vaux-Hall while the Dutchess Liv'd there?"

A. "I was never there while the Dutchess lived there, if she did live there."

Q. "Was you never there where she did live?"

A. "When nobody liv'd there, I have seen the house where they said she did live."

Q. "How long ago is that?"

A. "I don't know how long ago, but 'twas in the Summer-time."

Q. "How came you to take notice of that house more than the rest of the Houses in Vaux-Hall? Who was it told you the Dutchess lived there?"

A. "I think it was one that was ————————"

Q. "You said the Dutchess went sometimes by Water; did you go along with her at that Time?"

A. "Yes, I did, with some other Company."

Q. "Was you ever sent to the House, to fetch Goods from thence?"

A. "No."

Q. "Who went with you, when you went with the Dutchess there?"

A. "One Mrs. Bouffers, and two or three other Ladies."

Q. "D'ye know Sir John Germaine?"

A. "I never saw him but in his Coach, as he was going along the Street; I never saw him in any House, or any other Place, sitting or going, but in his Coach."

Q. "Was you never at his House?"

A. "I never was at his House, nor any Place where he lived."

Q. "You say you were at the Dutchess's Chamber to rub the Room?"

A. "Yes, I was."

Q. "Did you not see Vaness there?"

A. "No."

Q. "Can you take it upon your Oath that you never saw her there?"

A. "No, I never saw her there; but I saw Susan Barrington there."

Q. "What Service did Susan Barrington do there?"

A. "She hel'd to dress and Undress her Grace, and to mend Linnen, as I think."

Q. "When saw you her last?"

A. "'Twas about the 9th, 10th, or 11th of August last, at the George-Inn in Huntingdon."

Q. "D'ye you know where she lived then?"

A. "She was at Huntingdon then, and came with the Lady Dutchess to take a stage-coach for London; she was at the George Inn in Huntingdon, I think, about August last."

Q. "You say you liv'd at the Dutchess's House at Mill-bank, before the Dutchess came thither: Did Vaness come with her, or was she hired after?"

A. "I think she came with the Dutchess."

Q. "D'ye know whence the Dutchess came, when she came there?"

A. "As I have heard, she came from Vaux-Hall: When my lady Dutchess went thither by Water the Summer after, I was told, that my Lady Liv'd at such a House in Vaux-Hall."

Q. "Didn't you know that my Lady Dutchess liv'd at Vaux-Hall?"

A. "I never knew my Lady Dutchess till she liv'd at Mill-bank."

Q. "What Account had you at the Dutchess's House where she was then?"

A. "People said she was in Flanders."

Q. "D'you know when Vaness came to live with the Dutchess?"

A. "I believe she came to live with the Dutchess at Mill-bank."

Q. "D'ye know when she was discharged out of her Service?"

A. "I think 'twas the latter End of December, or the Beginning of January; I think so, but I don't speak positively."

Q. "Was you by when her Wages were paid?"

A. "No."

Q. "Have you ever seen her since?"

A. "No, I never saw her from that Hour to this."

Q. "Where have you lived since you left the Lady Dutchess's Service, and how? Have you any Estate?"

A. "I have a small Matter to live on; I live near Huntingdon, I was born near there; 'tis my native Place; I have lived there about four or five Years, or within seven Miles of that Place, or thereabouts."

Q. "Did Vaness Dress the Dutchess's Dinner when she lived there; for it seems she was not good enough to serve you?"

A. "Yes, she did dress the Dutchess's Dinner, but I did not care to eat Victuals of her Dressing."

This showed enmity between the witness and Elianor Vaness and the following questions indicated a plan on the part of the witnesses and counsel for the Duchess to make an attack against the evidence supporting the Duke. Elianor Vaness particularly was the object of their hatred and indirect accusation.

Q. "When did you first complain to the Dutchess that men follow'd Vaness? or, that you apprehended Danger by her being there?"

A. "I can't tell."

Q. "Was she discharged immediately after that?"

A. "I think she was discharged immediately after that?"

Q. "You say there were some other Ladies that went with the Dutchess to Vaux-hall; can you name them?"

A. "Mrs. Marshall, and some others; but I can't be positive."

Q. "Did you know Mrs. Brian?"

A. "No, I never heard her Name before."

Q. "Did the Dutchess eat always at Peterborough-house, or Mill-bank-house, as you call it?"

A. "Sometimes she eat abroad, and sometimes at home."

Q. "Who dressed her Victuals when she eat at home?"

A. "Lena."

Q. "What d'ye mean by Mill-bank-house?"

A. "Peterborough House."

Q. "Who did you hear say the Dutchess lived at that House at Vaux-hall?"

A. "The Dutchess was going by water, and told the Ladies then, that That was the House she had lived at, at Vaux-Hall; and walking in the Garden of the said House, told 'em so."

Jonas Peacock.

Die Lunae, 4 Martii, 1699.

William White sworn deposeth as followeth:

Cross-Examination:

Q. "You say you Liv'd with the Dutchess the first week of the first Trial: Was Vaness there at that Time?"

A. "She was gone before I came."

Guns opened again upon the witness for the Duke, Elianor Vaness.

Q. "How long?"

A. "I can't tell: I never saw her there, to the best of my Remembrance, but have heard there was such a one in the Family."

Q. "Did you know Hosier?"

A. "I see him come in at the Back-Door."

Q. "Whose servant was he then?"

A. "The first Time I did not know; but a little after, I was told he was Sir John Germaine's."

Q. "What Occasion had he to come to the Dutchess's House?"

A. "I know not, but about the Business of the Letter."

Q. "How often did you see him there?"

A. "Two or three Times, or more."

Q. "With whom?"

A. "With Susan Barrington."

Q. "What was his business with her?"

A. "About the Money, as she told me. He went along with that Woman; she sent a Letter by him; and she sent Letters by some other Dutchmen into Holland, about the Money."

Q. "Did he ask for any other Servant?"

A. "Not that I know of."

Q. "Did you see him above Stairs with her?"

A. "I never saw them in any Apartment but that Place below, where the Lumber is, near the Park-door."

Q. "D'you know Susanne Barrington?"

A. "I know her very well."

Q. "D'you know where she is now?"

A. "Her Mother died about the 10th of January, and then I saw her all in Tears; and she went away after this Account of her Mother's Death."

Q. "When did you see her last?"

A. "I have not seen her this Fortnight or month, that I know of, that I could distinguish her from another Woman, except she had a Mask on."

Q. "How long before this Trial saw you her?"

A. "About a Fortnight: She gave me an Account that her Mother died the 10th of January in Holland."

Q. "When did she go away?"

A. "I did not take notice of the Time she went away."

Q. "Did you know Hosier at any other Place but at the Lady Dutchess's?"

A. "Never, but as I have seen him in the Park, and with Mr. L'Estrange."

Q. "Was you never with him at Sir John Germaine's?"

A. "Never."

Q. "Do you know Sir John Germaine?"

A. "After I had lived with the Dutchess some Time, I was told by some in the Street, that that was his Coach, and his Livery, and that he was the Man that there was so much Noise about."

Q. "Did you never see him in the Dutchess's House?"

A. "I never saw him in no Part of my Lady Dutchess's House, nor in no Apartment; and I am the only Man that goes up and down stairs."

Q. "Did you never see him in the Dutchess's Company at any other Place?"

A. "No."

Q. "Did you constantly lie at the Dutchess's House?"

A. "When the Dutchess was last at Drayton, I lay at Richmond two or three Nights."

Q. "Did you lie constantly there, when the Dutchess was there?"

A. "I was sick near a Month, and all that Time I lay at my Wife's; but most commonly lay at the Dutchess's, since she is come to Duke-Street to live."

Q. "You say, You used to open the Door in the Park first in a Morning, what Time did you use to open it at?"

A. "At Six, Seven, or Eight o'Clock in a Morning; there was no certain Hour; but I generally open'd that Door."

Q. "Did you ever know Hauseur come in at any other Door but that?"

A. "Yes; one wet Day he came in at the Street-Door, before the Porter and all the Servants, and ask'd for the same Woman."

Q. "Did he never ask for any other Body?"

A. "I never heard him ask for any but Susan Barrington, for she was his Country-woman."

Here followed another imputation upon Nicholas and his testimony.

Q. "If Nicholas got in at the Park-door, could not he get up Stairs?"

A. "If he could get in that Door he talks of, he could not get into the Dutchess's Apartment; for there was a Room betwixt that, where the Plate and Jewels lay, that no Key could open: That if he could get up two Pairs of Stairs, he could not get in there."

Q. "If he had a Key, and got in any Door, cou'dn't Susan Barrington, when he came in, without any difficulty, lead him round the House?"

A. "I can't say but she might; but I never saw him, but below Stairs with that Woman, and then he went away without going up Stairs."

Q. "Did you never see him bring any Thing to the House?"

A. "No."

Q. "You nam'd one L'Estrange, that you saw with him at the Tavern, what is he?"

A. "He was my old Fellow-Servant at the late Duke of Norfolk's."

Q. "What discourse had you with him then?"

A. "He complain'd to me of his being ill, and I gave him the best of my Advice."

Q. "What Time was it that Nicholas had those threatning words against his Master?"

A. "About Ten, Eleven, or Twelve a-clock at Noon."

Q. "How long ago is it?"

A. "I can't tell if it be a Year or two Years; 'twas a little after Michaelmas; but whether it be one Year, or or two Years, I can't tell."

Q. "Couldn't Mr. L'Estrange tell?"

A. "I ask'd Mr. L'Estrange, and he cou'd not tell."

Q. "Whose Servant was Nicholas then?"

A. "He was nobody's Servant then: He rail'd against his Master at that Time for turning him away."

Q. "Did you know who was his Master a Year or two ago?"

A. "He told me he was out of Place."

Q. "Did you not know him to be Sir John Germaine's Servant, when he came to the Dutchess's?"

A. "I did not know it when I first saw him and Susan together; but some time before he went away, I heard he was his Servant."

Q. "But you say you did not know Sir John Germaine about two Years ago?"

A. "I did not know him so as to speak to him."

William White.

The foregoing examples are taken from the original recorded report of the case for the purpose of rendering to the reader some idea of the conduct of an ancient trial from the viewpoint solely of the procedure followed and the art displayed upon a cross-examination at that period.

For the further interest of the reader this particular trial concluded with the passage of the following resolution by the House of Lords, the argument of counsel being omitted and other parliamentary procedure of the case.

"Whereas some object against the passing the Bill, as if it would countenance a Jurisdiction in the House of Lords to examine to such Matters, in the first Instance

or Originally; the Objection would be the same if it had begun, as it might, in the House of Commons; but in truth would be of equal Force against most private, and several public Acts, occasioned by the Examination of Witnesses of Notoriety of Fact.

"Since therefore the Duke has so long, and so often in vain endeavored to be freed from a Lady, publicly famed and proved to have lived with Sir John Germaine, as his Wife; the Duke's former Disappointment can not but be powerful Arguments for his speedy obtaining that Justice which the Spiritual-Court cannot give him, their Power reaching no further than to that Liberty of living as she list, some Years since settled by Articles: But as none of less Art and Oratory than her Counsel, could have turned this into a License to commit Adultery, if she list, or a Pardon afterwards; had there not been Evidence of her acting according to such Construction, the Duke would have hoped she had repented of the former Injuries he had received from her; but now hopes, she shall no longer continue to bear the Name of his Wife, and put him in Danger of being succeeded by Sir John Germaine's Issue, or deprive him of the Expectation of leaving his Honours, Offices and Estates to a Protestant Heir."

CHAPTER 20

JOHN DONELLAN, ESQ.

Turning for a moment from great state trials to the common courtroom wherein the scene depicts the intrigues in the life of an ordinary English county family, excellent diversion is to be found in the case of John Donellan, Esq., charged with the murder of Sir Theodosius Edward Allessey Boughton, at the Assizes at Warwick, on Friday, March 30th, 1781 before the Honorable Sir Francis Buller—nearly a century after the last case cited.

The indictment which charged the murder to be committed by the medium of arsenic poisoning was found by the Grand Jury's inquest. The prisoner upon his arraignment pleaded not guilty whereupon he was placed upon his trial, a petit jury sworn and the fate of the defendant delivered over into their hands.

These are, in brief, the facts in the case charged and as outlined by the attorney for the Crown. Sir Theodosius Boughton was a young man of an ancient and respectable county family who, had he attained to the age of twenty-one years, would have had in his own power and at his own disposal, the whole of an opulent fortune in its entirety; in the event of his dying before that time, by far the greatest part of that fortune would have descended to his sister who was the wife of one John Donellan, Esq. The young man in question shortly before that time when he would have attained his said majority was possessed of a good constitution, affected by no indisposition that could have at all endangered his life. He was living at this period with his mother and

the aforesaid John Donellan, Esq. and the latter's wife, his sister.

Donellan, learning of Sir Theodosius' plan to pay a visit to a young gentleman by the name of Fonnereau in Northamptonshire and of his proposal to stay with him until he became of age, immediately commenced circulating rumors to the effect that the young gentleman in question was in ill health. In truth Sir Theodosius was at that time being attended by a Mr. Powell, an apothecary, who visited him for a slight venereal disorder he had contracted and who in the course of that cure, had given him some cooling medicines. On Tuesday the 29th of August, 1780, said Powell made up a draught, and sent it to him by a servant for the purpose of its being taken on the next morning which was Wednesday. This fact became known to Donellan who, it was charged in the indictment, secretly substituted for it a poison specially prepared by himself for the making of which preparation the evidence in the subsequent trial showed he had special knowledge. It appeared that young Sir Theodosius drank of the substituted poison, went into convulsions and died. There were many other surrounding suspicious facts all brought out in the trial among which were, that prior to the execution of the alleged plan above described Donellan had made untrue statements relative to Sir Theodosius' goings and comings and that Sir Theodosius was quite ill, and that subsequent thereto he had given out as the cause of the young man's death different stories to different people. In due time these suspicions ripened into a grand jury indictment accusing Donellan of being the murderer of Sir Theodosius. The case was brought to trial at the time and place above indicated.

Lady Anna Maria Boughton, the mother of Sir Theodosius testified for the crown, supporting the brief out-

line of the case heretofore given and in addition thereto that she, upon the fateful evening, had given to her son the fatal remedy thought by her to be a physic; that she had left the room thereafter intending to drive with Donellan at the latter's request; that she had, however, before her intended departure, gone to her son's room and found him in agony; that she thereupon dispatched a messenger for the apothecary but that her son died before any aid could reach him; that upon her son's death Donellan came directly into the room and over her protest washed or caused to be cleansed the medicine cups including the one which had held the potion drunk by the deceased.

Other evidence in the trial showed that Donellan possessed a still and that he was in the habit therewith of distilling rose and laurel water, but for that matter let the evidence speak for itself.

The cross-examination of Lady Boughton was conducted by Mr. Newnham for the defendant, Donellan.

Lady Anna Maria Boughton.

Cross-examination:

Q. "When was it that your ladyship and Sir Theodosius went to Bath?"

A. "The 1st of November, 1778."

Q. "When did you hear Captain Donellan say that your son was in a bad state of health, how long before his death?"

A. "He often talked about it for three weeks or a month before the time of his death."

Q. "That was only after he had been attended by Mr. Powell for a recent complaint, but before that you was pleased to say Mr. Donellan often expressed to you that Sir Theodosius was in a bad state of health?"

A. "Yes, that he was in a bad way, or that something or other would happen to him."

Q. "How long before was that?"

A. "That was about a fortnight or three weeks before."

Q. "Had not you yourself apprized Mr. Donellan and his lady, long before this, that your son was in a bad state of health?"

A. "I had said that my son had been ill of a particular disorder."

Q. "Had not you written to Bath in the year 1777 and 1778, 'that his fine complexion was gone, and he was in a very bad way'?"

A. "I said I was afraid he was in a bad way, for his complexion was altered."

Q. "I quote your words, 'His fine complexion was gone'?"

A. "Yes."

Q. "At what time did you go to Bath?"

A. "The 1st of November, 1778."

Q. "You had previously informed Mr. Donellan that your son was in a bad state of health?"

A. "Yes."

Thus far the cross-examination was tearing at the crown's contention that Donellan had prepared for this murder by circulating rumors before its execution that Sir Theodosius was in a bad state of health and about to die. Counsel has here succeeded in securing an admission from Lady Boughton that she too had entertained the same opinion regarding her son's condition and had so expressed it.

Q. "Sir Theodosius went with you to Bath?"

A. "Yes."

Q. "Do you recollect a quarrel that happened between Sir Theodosius and a gentleman at Bath?"

A. "Yes, and Mr. Donellan interfered to prevent anything happening."

Q. "Does not your ladyship recollect a quarrel your son had at Rugby?"

A. "Yes."

Q. "Pray, who was sent for on that occasion?"

A. "Mr. Donellan."

Q. "Did not your ladyship go to Mr. Donellan's room door, and early in the morning press him to go over immediately?"

A. "Yes."

Q. "Did not you put the letter under the door?"

A. "I wrote a letter, and had it put under the door, desiring him to go to Rugby, on account of a quarrel that had happened there."

Q. "Did Mr. Donellan interfere and prevent any mischief happening there?"

A. "He told me he did."

Q. "Now, as to a third quarrel; whether he had not another quarrel with a gentleman at Daventry?"

A. "They were both at Rugby."

Q. "With a Mr. Wildgoose of Daventry, at Rugby?"

A. "Yes."

Q. "Was there not a quarrel with Mr. Chartres?"

A. "Yes, at that time I believe, but I am not certain."

Q. "Don't you recollect your son telling you that he went up at Newbold to the church steeple, and that if it had not been for Mr. Donellan, who caught him in his arms, he must have broke his neck?"

A. "He did not tell me that."

Q. "Did not he tell you he went up to the top of the church?"

A. "Yes, but he did not tell me about being in any danger."

Q. "Did not your ladyship, when he told you he had met with an accident and an escape, inquire into the particulars of it?"

A. "I don't remember that he did tell me so."

Thus far the questions avoided facts concerning the alleged crime itself and tended to show a close confidential relationship between the mother and Donellan; how the latter had served Sir Theodosius, saving him from trouble, withdrawing him from escapades; and how the family had depended always upon the prisoner.

The interrogations then led toward the thought that Sir Theodosius had previously suffered from convulsions and that the fatal dose alone was no indication of prepared poison.

Q. "Do you remember no circumstance; don't you remember his mentioning that part of the church tumbling down when he was at the top of the church?"

A. "No."

Q. "Did not you return home together in the coach, and did not he mention it in the coach to you that he had been at the top of the church, and had fallen down in going up to the weather-cock?"

A. "I don't remember any thing of it."

Q. "What time in the morning was it that your ladyship arose on the 30th of August?"

A. "About six o'clock, I believe."

Q. "On the day before you said Sir Theodosius had been fishing?"

A. "Yes."

Q. "What time did he return home?"

A. "At a little after nine o'clock, I believe."

Q. "Did not your ladyship express some anxiety about his being out so late?"

A. "I sent to him, he did not come; I said, 'Tell him I want to speak with him.' "

Q. "Do you recollect whether Mr. Donellan was, or not, gone to bed before Sir Theodosius returned?"

A. "I believe he was."

Q. "Was not your ladyship and Mr. Donellan to ride out together the next morning?"

A. "The prisoner asked me to go with him to the Wells. I agreed to go."

Q. "Did not Mr. Donellan ask your ladyship, under the window, if you was ready?"

A. "As I passed by the window that looks into the court, I heard Mr. Donellan call out, 'Is your ladyship ready to ride out?' I said, 'I shall be ready in about a quarter of an hour, I am going to put my things on.' He said he would go to the Wells."

Q. "That was after you left your son's room, when you thought he was going to sleep?"

A. "Yes."

Q. "How happened it, after your son had had these convulsive appearances, and had frightened your ladyship so much, that you did not at that time disclose to Mr. Donellan that he was in that condition, and you could not ride out?"

A. "I thought he appeared as if he was going to sleep; it went off, and he seemed to dose; so I imagined it was only his violent efforts to prevent bringing up the physic."

Q. "You said it was in less than ten minutes after he took the medicine that those appearances came upon him?"

A. "In two minutes and a half, or less."

Q. "Did your ladyship give Sir Theodosius his physic upon the Monday."

A. "No."

Q. "You was not in the habit of giving it to him?"

A. "Now and then I did."

Q. "You recollect his saying it had a very nauseous taste?"

A. "Yes."

Q. "And a very nauseous smell?"

A. "An ugly taste and an ugly smell."

Q. "Did your ladyship ever mention, when examined before the coroner, this fact, that Mr. Donellan said, 'I should not have known what I should have done, if I had not thought of saying that I did it to put my finger in to taste?' "

A. "I did mention this before the coroner. My evidence was, he said, that I told him of his washing it. I asked him why he did so. He said he did it to put his finger in to taste."

Q. "I asked your ladyship whether you disclosed before the coroner, that Mr. Donellan told Mrs. Donellan, in your hearing, that if he had not thought of saying that he did it to put his finger in to taste, he could not have known what to have done. Did you mention that circumstance before the coroner?"

A. "Yes."

Q. "And swear it?"

A. "Yes."

Q. "I believe you was examined a second time; was it upon the first or second examination?"

A. "I am not certain."

Q. "Was your examination read over to you before you signed it?"

A. "Yes."

Q. "I wish to ask your ladyship again whether this circumstance was disclosed in your evidence?"

A. "I said he told me that he did it to taste."

Whenever it is possible for a prospective witness to be examined relative to the facts in a case by the adverse party prior to the trial it is always an advantage on subsequent cross-examination. This is for the reason already stated in this volume that the frailty of human

memory precludes the possibility of recalling anything with unblemished accuracy for any length of time.

This principle was recognized in the present cross-examination. The barrister who was interrogating Lady Boughton had obtained copies of her previous testimony before the coroner at his inquest and took advantage of every slight variance or omission therein contained as it related to her evidence in court.

Q. "Your examination was read. There is no such thing as that contained in it. Did you mention the circumstance of the coachman being sent for into the parlour, and Mr. Donellan's asking him if he did not remember his going out at the iron gates at seven o'clock in the morning? and upon the servant's answering in the affirmative, Mr. Donellan's saying, 'Will, now you are my evidence?' Was that mentioned by your ladyship before the coroner."

A. "I mentioned it to Mr. Caldicot, but whether I mentioned it before the coroner I can not remember."

Q. "Tell me the analogy,. if you can, between the conversation that Mr. Donellan had with Mrs. Donellan in your presence, and his immediately sending for the coachman to know if he was up at seven o'clock or no. Did any conversation pass that led to that?"

A. "Not that I know."

Q. "You said something about Mr. Donellan's mare. One of the servants informed you that the mare was about the house. In point of fact, did not the servant go upon Mr. Donellan's mare to fetch Mr. Powell?"

A. "I was not in the yard to see."

Q. "Do you not know that as a fact?"

A. "I did not see him go."

Q. "Did you see him return?"

A. "No, I did not."

Q. "You told Mr. Howorth that Mr. Donellan put

the bottle a second time into the hands of Sarah Blundell, was the circumstance disclosed in your evidence before the coroner?''

A. ''I do not recollect.''

Q. ''Whether you don't know Sir Theodosius did amuse himself in laying poison for fish?''

A. ''Sir Theodosius did sometimes amuse himself in laying poison for fish.''

Q. ''Where was it he put those things that he used to amuse himself with?''

A. ''I won't mince the matter.''

Q. ''Don't you know of his buying large quantities of arsenic?''

A. ''He sent for a pound, and after his death a quantity of arsenic was found in his closet.''

Q. ''Where did he use to keep that?''

A. ''In his inner closet.''

Q. ''Which was sometimes locked?''

A. ''Mostly.''

Mr. Howorth. ''You have been asked of instances of friendship shown by Mr. Donellan to your son: what was Mr. Donellan's general behavior for some months before he died? did he treat Sir Theodosius with respect, friendship, and tenderness, or otherwise?''

A. ''About a fortnight before my son's death I heard——''

Court. ''Have you heard your son say anything about Mr. Donellan's behaviour at the time when he gave you the relation mentioned by Mr. Newnham?''

A. ''They used to have words, to be angry with each other; they did not in general live in friendship and intimacy.''

Mr. Newnham. ''It was your ladyship's house?''

A. ''Yes.''

Q. "I presume they had those sort of words that occasionally happen in all families, more or less?"

A. "I paid no great attention to it."

COURT. "At the time you mentioned when you came down into the parlour, Mr. and Mrs. Donellan were both there?"

A. "Yes."

Q. "How long had Mr. Donellan been gone out of the room where Sir Theodosius died before you went into the parlour?"

A. "Not long; I went into my own room first."

Q. "After you got into the parlour, was there any conversation between you and the prisoner, previously to his saying you had been pleased to take notice of his washing the bottles?"

A. "I do not recollect any, but he was talking to Mrs. Donellan."

Q. "Was that spoken in a passion or resentment, or how?"

A. "Rather in a way of resentment."

This was a very good cross-examination in a very bad case. Counsel did all that he could. He avoided in the main the crime; showed that Sir Theodosius himself played at poisoning and had placed arsenic himself in the very room in which he died at that time.

Next came Samuel Frost, the servant who had been sent for the apothecary on the night of Sir Theodosius's death. His examination which was brief is given in full.

Samuel Frost sworn, examined by Mr. Howorth, crown counsel.

Q. "Were you the servant sent by Sir Theodosius Boughton to Mr. Powell at Rugby, on the Tuesday, for a medicine?"

A. "I was."

Q. "From whom did you receive the medicine?"

A. "From Mr. Powell's own hands."

Q. "Into whose hands did you deliver the medicine?"

A. "Into the hands of Sir Theodosius Boughton."

Q. "At what time of the day did you bring it?"

A. "Between five and six o'clock in the afternoon."

Q. "What did he do with the medicine when he received it?"

A. "He went with it up-stairs."

Q. "Were you with him that afternoon a-fishing?"

A. "About seven o'clock I was."

Q. "Did you stay with him until he returned?"

A. "I did."

Q. "Was Captain Donellan along with Sir Theodosius Boughton any part of the time?"

A. "No, he was not."

Q. "Was Sir Theodosius Boughton on foot or on horseback?"

A. "He kept on horseback all the time."

Q. "Was it possible for him to wet his feet?"

A. "No, he had his boots on, and continued on horseback all the time."

Q. "Had you occasion to go into his room next morning before he took his physic."

A. "Yes."

Q. "At what time did you go?"

A. "About six o'clock."

Q. "Did you awake him?"

A. "I did, in order to get some straps to buckle on a net I was going to carry somewhere."

Q. "Who gave you those straps?"

A. "Sir Theodosius Boughton; he got out of his bed, and went into the next room to take them out."

Q. "How did he appear at that time in his death."

A. "He appeared to be in a very good state of health."

Samuel Frost, cross-examined by Mr. Dayrell, counsel for defendant.

Q. "It was between five and six o'clock when you brought the medicine from Mr. Powell's?"

A. "About that time."

Q. "Was it nearer six or five?"

A. "I can't say."

Q. "How long was it after that, that Sir Theodosius Boughton went a-fishing?"

A. "He was a-fishing when I went to him, about seven o'clock."

Q. "But when did he go a-fishing?"

A. "I did not see him when he went out, I was not in the way."

Q. "Where was he when you delivered him the medicine?"

A. "On the other side the brook, when I went to him."

Q. "Was he a-fishing when you delivered him the medicine?"

A. "No; I delivered the medicine to him upon the stairs, his sister stood by him when I delivered it to him."

Q. "What did he do with it?"

A. "I can not tell what he did with it, he took it upstairs in his hands, and showed it to his sister."

Q. "How soon afterwards was it that you saw him at the brook?"

A. "It might be a couple of hours after I gave him the medicine."

Q. "Do you know what time he came home?"

A. "Near nine o'clock, I believe; it was quite dark when he came home."

Q. "Did your master complain that the physic Mr. Powell had sent him before made him sick."

A. "I never heard him make any complaint of it."

Q. "Did not you tell Mr. Powell so?"

A. "Not that physic; he never said anything to me about it."

Q. "Did he about any physic?"

A. "Not to me."

Q. "What did you mean by saying not that physic?"

A. "He took one dose of physic, which made him very ill, and he brought it up again; but he did not mention anything to me about it."

Q. "Was any other person present besides his sister when you delivered the medicine to him."

A. "There was not."

Q. "What time of day did you generally dine at lady Boughton's?"

A. "About two or three o'clock, or sometimes later."

Q. "How soon after dinner had you seen Mr. Donellan?"

A. "About seven o'clock I believe, in the garden."

Q. "You had not seen him from dinner time till then?"

A. "No."

Q. "Who was with him in the garden?"

A. "My lady and Madam Donellan."

Q. "Did you see nothing of him from dinner time till seven o'clock?"

A. "No."

Q. "Do you know when Mr. Donellan came home that night?"

A. "No."

Court. "How long was it after you delivered the medicine to Sir Theodosius Boughton, before he got on horseback, and went a-fishing?"

A. I can not tell, I was not in the house when he went."

The gist of this cross-examination was again an attempt to show that the medicines previously furnished by the apothecary had made Sir Theodosius ill.

Came now the apothecary himself. His direct testimony is not given as his cross-examination was largely self-explanatory and the reader can in the main comprehend its purpose and direction.

Mr. Thomas Powell, cross-examined by Mr. Newnham.

Q. "Describe exactly the proportion of the several ingredients.

A. "Fifteen grains of each, of rhubarb and of jalap; spirits of lavendar, twenty drops, nutmeg water, two drachms; two drachms of simple syrup, and an ounce and a half of simple water.

Q. "Then there are two ounces only of liquor, except the twenty drops of lavendar?"

A. "Yes."

Q. "You had given one of these draughts on the Monday?"

A. "Yes."

Q. "What effect had the first medicine you gave him?"

A. "It purged him very well, and agreed with him very well; he had many stools."

Mr. Howorth. "Did it make him sick?"

A. "Not at all, it agreed with him very well; it was on the Saturday it made him sick; and in consequence of that I changed the physic from manna and salts to rhubarb and jalap."

Mr. Newnham. "You say that Mr. Donellan told you that Sir Theodosius died of convulsions, and that was all the conversation about it?"

A. "Yes."

Q. "Did it not occur to you, as a physical man, to

inquire when these convulsions commenced, and when Sir Theodosius died?''

A. ''The convulsions took place soon after the draught was taken.''

Q. ''What idea have you of soon?''

A. ''A quarter of an hour, or sooner.''

Q. ''Do you know for certain?''

A. ''I do not.''

Q. ''Why did you not inquire?''

A. ''I did inquire.''

Q. ''You saw Lady Boughton?''

A. ''Yes.''

Q. ''Had you no conversation with her?''

A. ''Yes, she said he was convulsed soon after he took the medicine.''

Q. ''Did not you inquire how soon?''

A. ''He was convulsed almost immediately.''

The crown introduced its medical expert, who having testified to his professional observations, submitted to attack from the defendant's attorney. The latter tried to make some other cause out of the death of Sir Theodosius than of poisoning by Donellan.

Although the original indictment charged poisoning with arsenic, the subsequent medical report and testimony changed the theory to laurel water distilled by Donellan. The indictment stood but the evidence was altered.

Dr. Parsons, cross-examined by Mr. Newnham.

Q. ''From the appearance of health in Sir Theodosius Boughton, and from the medicine not having occasioned any bad symptoms before, you conclude his death was occasioned by some other medicine substituted instead of that, or in addition to it?''

A. ''Most certainly, especially as the smell of it be-

spoke its having received the addition of a very poisonous ingredient."

Q. "Have you ever known instances of persons being taken suffering when engaged in pleasure, or business, or at dinner, and dying convulsed, epileptic or apoplectic?"

A. "I have; but those who died suddenly of apoplexy are generally persons of a full habit, and who are neither so thin or so young as Sir Theodosius Boughton."

Q. "Have you never known instances of persons of a thin habit being attacked by apoplexy or epilepsy?"

A. "By epilepsy they may."

Q. "Have you never heard of a person having the appearance of perfect health being seized with an epilepsy without any primary cause giving any warning; have you never heard of people in perfect health being seized with an epilepsy or apoplexy?"

A. "Yes apoplexy proceeding from repletion or the sudden bursting of a blood vessel; epilepsy may proceed from a variety of causes, partial or general, in the head or elsewhere; but very seldom, I believe, proves so suddenly fatal."

Q. "Might not those have happened to Sir Theodosius Boughton?"

A. "There can be no doubt of the possibility of their attacking him; but I think there is no reason to go so far for a cause as to possibility, when this medicine, as all the world knows will effect it."

Q. "That is assuming, as a fact, that he took two ounces of laurel water?"

A. "A much less quantity would be sufficient for the purpose, if we may credit Dr. Rutty's account."

Q. "You collect that from the similarity of smell?"

A. "We have nothing else to judge from but the similarity of smell."

Q. "Is not that the case with a variety of things; will not black cherry water have that smell?"

A. "Black cherry water is said to have the same smell; but it is now out of use. I don't suppose there is an apothecary on the island who has it; and, therefore, it could not be substituted by accident for the other vehicle."

Q. "Will not bitter almonds have that smell?"

A. "Yes, and spirits flavoured with them are said to be poisonous to the human species."

Q. "You ground your opinion upon the description of its smell by Lady Boughton?"

A. "Yes; we can ground our opinion upon nothing else but that, and the subsequent effects."

Contradictory statements made by Donellan while in jail to a fellow prisoner were brought into play by the introduction of the evidence furnished by this said cellmate, John Darbyshire.

John Darbyshire sworn, examined by Mr. Digby.

Q. "You was a prisoner in Warwick jail for debt?"

A. "Yes."

Q. "Have you had any conversation with Mr. Donellan?"

A. "Yes, I have."

Q. "How came you to enter into any particular conversation with him?"

A. "We were both in one room together, he had a bed in the same room I had, for a month or five weeks, I believe. In our conversation in the prison, I used to tell Captain Donellan what I had heard. I remember one time we had a conversation about Sir Theodosius Boughton's being poisoned: I asked captain Donellan whether the body was poisoned or not. He said there was no doubt of it. I said, 'For God's sake, captain, who could do it?' He said, 'It was done amongst themselves; he

had no hand in it; he had nothing to do with it.' I asked who he meant by themselves. He said, himself, Lady Boughton, the footman, and the apothecary."

Q. "Who did he mean by himself?"

A. "Sir Theodosius Boughton. I said, 'Sure, he could not do it himself.' He said, no, he did not think he did; he could not believe he would. I told him I thought the apothecary could hardly do it, for he had no interest —he would lose a good patient; that his footman could have no interest in it; and it was very unnatural to suppose that Lady Boughton would do it. He then spoke of Lady Boughton, how covetous she was; he said she had received an anonymous letter the day after Sir Theodosius' death, charging her plump with poisoning Sir Theodosius; that she called him and read it to him, and she trembled: he said she desired he would not let his wife know of that letter; and asked him if he would give up his right to the personal estate, and some estates of about two hundred pounds a year belonging to the family. I think that was the substance of that conversation."

John Darbyshire, cross-examined by Mr. Newnham.

Q. "Had you ever any acquaintance with Mr. Donellan before he came to Warwick jail?"

A. "No."

Q. "You never had seen him before?"

A. "Never."

Q. "When had you this conversation?"

A. "In less than a month after he came into the jail."

Q. "Soon after his coming?"

A. "It was not a month, I am sure."

Q. "What way of life was you in before you came to his jail?"

A. "A tradesman, and a very reputable one."

Q. "And a successful tradesman?"

A. "I have failed."

Q. "How often?"

A. "Twice, the more is my misfortune."

Q. "Do you mean twice a bankrupt?"

A. "Yes, but I fell fairly."

Q. "Where did you live?"

A. "At Birmingham."

Q. "You know Mr. Pope very well?"

A. "Yes."

Q. "And Sir Alexander Leith too?"

A. "I did not know him."

Q. "But you did know Mr. Pope?"

A. "Yes, I did; but not Sir Alexander Leith; I never spoke to Sir Alexander in my life."

Q. "What time of the day was it when this conversation happened which you represent to have been held between you?"

A. "I fancy it was before dinner; we had had that conversation, at least parts of it, frequently; he talked of this affair, I suppose, hundreds of times."

Q. "So that was his usual account?"

A. "Not that very language, speaking about Sir Theodosius Boughton's death being imputable to Lady Boughton; but has said, that he was innocent. He said it was impossible he could do a thing which was not in his power; he said it was never in his power to do it."

Mr. Howorth. "Did the prisoner in any of those conversations ever make a doubt that Sir Theodosius Boughton was poisoned by somebody?"

A. "Since Christmas, I think he has said he was not poisoned."

Q. "How lately has he altered in his conversation?"

A. "I can not justly say."

Q. "Have you in conversation heard him say that he was poisoned."

A. "Yes, I have."

The defendant's counsel did not do so well. By asking needless questions it was developed that Donellan was changing his story.

For the information of the reader it may be added that the conviction having been had in this case, a sentence of death was imposed upon the prisoner, John Donellan, and subsequently executed.

CHAPTER 21

THE TRIAL OF QUEEN CAROLINE

One of the outstanding quasi-criminal trials in the history of English Jurisprudence was that conducted in the British parliament against her Majesty Queen Caroline, wife of George the IV, to deprive her of all rights and titles to office by reason of certain alleged misconduct on her part when she was the Princess of Wales prior to her ascension with her husband to the throne of England. In this great case occurs much brilliant cross-examination, the rendering, by the learned Judges of England at the behest of the parliament of several labored opinions relative to the rules of conduct in such examinations and decisions regarding the applicability of questions, the proper form and sequence in the putting thereof, and the admissibility of the evidence thus educed. Nearly a century and a quarter after the case of the Duke of Norfolk hereinbefore cited and almost a half century following the trial of John Donellan, it constitutes in a way a summary of many of the important precedents evolved since the days of the Great Charter regarding judicial procedure and the guarantees of the rights of the individual, be he party or witness, monarch or the humblest citizen within the realm. Upon recollection that the same common law of England, except as amended by proper statute or constitutional provision, governs judicial determinations in the United States, the reader should instantly feel the deepest interest in following its line of development.

The trial of Queen Caroline began August 17, 1820 by virtue of a bill introduced in the British parliament, and

the record of the case as officially published follows in part in order:

THE
TRIAL OF QUEEN CAROLINE, AUGUST 17, 1820

"A Bill to deprive Her Majesty Caroline Amelia Elizabeth, of the Title, Prerogatives, Rights, Privileges, and Pretensions of Queen Consort of this Realm, and to dissolve the Marriage between His Majesty and the said Queen."

This bill proceeded to charge that her Majesty, then Queen Consort, had previously when Crown Princess, while in Italy, engaged in her service, in a menial situation one Bartolomo Bergami, a foreigner of low station; that a most degrading and unbecoming intimacy had commenced between her Royal Highness and the said Bartolomo Bergami; that she had been guilty of a licentious, disgraceful, and adulterous intercourse with the said Bartolomo Bergami, creating for him fictitious titles of nobility; all to the disgrace of the Monarch and to the dishonor of the Realm.

This trial which lasted for weeks and months—even years if the preparation therefore were to be taken into account—not only tore asunder public opinion in England at that period but created a European scandal. Today it has long sunk into the forgetfulness of oblivion. Even lawyers are unacquainted with its record. But in that day, as well as being a great scandal, it constituted a summing up of many of the great legal precedents of the ever growing common law of England. In so far as these apply to the development of cross-examination examples therefrom will in this chapter be given. Lord Brougham and Mr. Williams for the defense displayed themselves as masters in the growing art thereof. Many of the questions therein propounded would not today be

competent; rules have altered and evolved; but the great case stands as a landmark in the development of Anglo-Saxon legal procedure. The vice of a queen was alleged and the good name of a kingdom was at stake.

The prosecution was conducted by the Attorney-General for the Crown and after the charges against the Queen were made and the opening statements thereof concluded, the witnesses were called, among whom was one Theodora Majocchi, an Italian, who had been with the Queen in Italy during her sojourn there while she was the Crown Princess of Wales and in company with the aforesaid Bergami.

In substance the testimony of Majocchi related that he was acquainted with the said Bergami, having served under him in Italy in the household of Her Royal Highness the Crown Princess of England; that Bergami at first also served in this same household as a courier and as an equerry; that Bergami's situation changed however, his, Bergami's sleeping quarters being placed adjacent to those of the Princess; that Bergami and the Princess were familiar with each other, journeyed together, breakfasted together, and practically lived together; that Majocchi had observed the Princess and Bergami in love-making and in the act of kissing each other; that upon said journeys the bedrooms of the Princess and Bergami were always arranged to be adjoining, with an intervening communicating alcove, and that Bergami's bed on succeeding mornings did not have the appearance of having been occupied; that the Princess and Bergami, he, the said witness, had seen in the same room together partly unclad; that they had journeyed to sea, situated on ship board together with staterooms similarly arranged as above indicated bedrooms during their travels on land; and much more of the same in particular detail.

The direct examination of this witness is here omitted for the sake of brevity. In the portions of his cross-examination selected, the reader will easily be able to follow the line of reasoning employed by the defendant's counsel and readily comprehend from the foregoing substance of the main charges the purpose and direction of its intent. Leaving then to his interpretation the basic facts sought to be elicited by the cross-examination, the following is submitted.

To show the procedure, however, the opening record is given:

Theodora Majocchi was then called in

Nicholas Dorier Marchese di Soineo was sworn as Interpreter, in support of the Bill; and Binetto Cohen was sworn as Interpreter, on behalf of the Queen.

Mr. Solicitor General (For the Prosecution). "Of what country are you a native?"

A. "Of Pisterlango."

Q. "Is that in Italy?"

A. "Yes; twelve miles distant from Lodi."

This began the complete and lengthy direct examination of Majocchi lasting some days which will be omitted as indicated.

Portion of cross-examination.

Questions by Mr. Brougham.

Q. "You have said that in the house at Naples, the rest of the suite of her Royal Highness except Bergami slept in another part of the house from her Royal Highness."

A. "I do not remember whether the other family slept separate or distant."

Q. "Do you now mean to say that the rest of the family of the suite, excepting Bergami did not sleep at a distant and separate part of the house?"

A. "I remember the position of the bedrooms of her Royal Highness and Bergami, but those of the family I do not recollect."

Q. "Then you do not recollect now, and you will not swear now, that the rest of the suite of her Royal Highness did sleep apart at a separate part of the house?"

A. "I remember well where her Royal Highness and Bergami slept, but as to the rest of the family, I do not recollect where they slept."

Q. "Was not this question put to you the day before yesterday, 'Did the other people of the suite sleep in that part of the house or at a distance?' "

A. "I remember the position where her Royal Highness slept."

Q. "Answer the question put to you, was not the following question put to you the day before yesterday, 'Did the other people of the suite sleep in that part of the house, or at a distance'?"

A. "Yes, it is true."

Q. "Did you not give to that question, the following answer: 'They were separated?' "

A. "I said they were separated, but I meant that they were so situated that they could not communicate together; I meant to say that they could not communicate together."

Q. "Did you mean by that, that there was no passage, no way by which a person could go from the room of her Royal Highness to the rooms of the others of the suite?"

A. "Yes."

Here the learned counsel for the Queen attempted to show that others associated with her at this time had proximate access to her chambers, and that the position of Bergami's room carried with it no value of relative importance to the crown. Also these questions were leading toward impelling the witness to contradict him-

self and his previous testimony. As brought out and exemplified in this volume a favorite method was here employed; namely, that of taking from the previous record a question and witness' answer thereto, asking witness if he did not respond thus and so as recited, directly following some reply witness made on cross-examination inconsistent therewith. Judges are aware of the idiosyncrasies of the human mind and unless counsel is careful he will do himself more harm than good. The witness can easily explain it or even say that he had misunderstood the previous question or was mistaken or that he now recollects the answer more clearly and that he was before wrong. All this can be done if the witness is telling the truth. If he is not, however, he will become confused and his entire testimony, perhaps, rendered of no value.

To continue:

The Solicitor-General. "The first answer given by the witness was that the rooms were separate, and he now repeats it."

Mr. Brougham. "I know that perfectly well, and have so stated it. My learned friend seems to triumph in a mare's nest which he thinks he has found."

Q. "Do you mean to represent, that there was no way of going from the Princess's room to the rooms of the rest of the suite, except by Bergami's?"

A. "What I remember is that I have seen no passage."

Q. "Do you mean to represent, that there was no way of getting from Her Royal Highness's room to the rooms of the rest of the suite?"

A. "I have seen no other, I have seen no passage."

Q. "No other passage than what passage?"

A. "I have not seen any passage that led from the room of her Royal Highness to that of the family. I

have seen no door except that which led into that of Bergami."

Q. "Do you know where the rest of the family, in point of fact, had their rooms?"

A. "I do not remember that."

Q. "Will you swear that the rooms of Hieronimus and Doctor Holland and William Austin were not close by the room of her Royal Highness?"

A. "This I do not recollect."

Counsel now began a new attack.

Q. "When you went from Vienna to Milan with your father, where did you lodge?"

A. "At my house."

Q. "How did you support yourself?"

A. "With my money."

Q. "How long did your own money last?"

A. "I do not remember how long it lasted me."

Q. "Did anybody give you any money there?"

A. "I do not remember; when I left Vienna I received money, but after I had left Vienna nobody gave me money, for I must speak clearly or openly."

All this was an effort to prove the witness to be a man unable to live upon his own resources and to leave the inference that those interested in the prosecution had either bribed him for his testimony or given him sufficient money to enable him to exist while awaiting trial.

However Theodora Majocchi was later twice recalled. On the first of these occasions a few questions and answers are given to amplify rules already laid down herein as to the proper manner of laying the foundation for impeachment on cross-examination and to review the arguments of the learned counsel and the opinion of the Honorable Judges.

Theodora Majocchi recalled:

Questioned by the Queen's Counsel, Mr. Brougham.

Q. "Did you ever represent the Princess of Wales to any person in a stage coach as a much injured woman?"

A. "This I remember no more no than yes."

Q. "Did you represent to any person in a stage coach, or elsewhere, that you had been applied to, to swear against her Royal Highness the Princess?"

A. "What I remember of these things is, that I have never spoken of these things in any place; in whatever carriage I might have been I do not remember to have spoken of these things."

Q. "Did you represent yourself to have been applied to to swear against her Royal Highness, the Princess of Wales, to any person in any place, whether in a stage coach or any other place?"

A. "I do not understand what you mean by the word swear."

Q. "To give evidence?"

A. "At what time."

Q. "Did you ever say to anybody that you had been applied to, to give a deposition against the Princess of Wales?"

A. "I can not understand what this term means; I can not understand what this thing can mean."

Q. "Did you ever say to anybody in England that you had been applied to, to give an account respecting the Princess of Wales upon oath?"

A. "In England; no, never."

The Solicitor-General. "I hope your Lordships will permit me to offer a single remark on the course of examination now pursued by my learned friend. I understand your Lordships to have laid down, as a rule, that the examination of witnesses should be conducted

according to the mode adopted in courts below. I conceive the object of the questions now put to the witness is to elicit denials as to statements made by him, which denials will afterwards be contradicted by another witness. It is the practice on all occasions of this kind, in the courts below, to mention at once the name of the witness with whom the supposed conversations have been held."

Mr. Brougham. "I submit that such a rule can not be uniformly acted upon. It must be necessary, sometimes, to conceal the name of the person who is to prove the falsehood of a witness, as the witness will be put on his guard if he has reason to believe that that person is forthcoming."

The Solicitor-General. "I find my learned friend is totally unacquainted with the rules of the courts below."

Mr. Brougham. "The Solicitor-General appears to me unacquainted with these rules, as well as with the first rule of all judicial proceedings, which is not to interrupt an adversary before he has concluded his observations. I apprehend that my learned friends who are with me on this occasion, have had as much experience and knowledge of these rules as the Solicitor-General, and I shall, therefore, consider the rule which the Solicitor-General attempts to establish as a mere dictum of his own. It may be very well to observe such a rule on particular occasions, but in a case of this kind, it would prevent the most perjured witness from being detected. I confidently appeal to your Lordships, notwithstanding the monopoly of legal learning claimed by the Solicitor-General, whether I am not entitled to draw from the witness declarations that he had never made this or that statement to any person, and then to produce, for the first time, A or B, to whom such declarations had been made."

The Lord Chancellor. "I am inclined to think that the ordinary rule is, to mention, in the first instance, the name of the person to whom the witness is supposed to have made certain communications; I will not, however, pledge myself to the affirmative. It is certainly obvious that a very honest man might forget generally that he had or had not stated a particular fact, and yet recollect it when he heard the name of the individual to whom he had made the statement. This I do not consider could throw any slur on the testimony of such a witness. I have had no experience in proceedings at Nisi Pruis for the last twenty-five years, and I do not know what rule is now generally adopted; but in my time such a rule would at least have been thought fair and reasonable."

Mr. Brougham. "I merely protest against the universality of its application. I will, however, at once mention the name of the individual."

Q. "Did you ever say to Mr. Johnson in the stage coach, that you had been applied to, to appear as a witness against the Princess of Wales?"

A. "I swear that I do not know his name, and this man I do not know, either the name or even the circumstances of taking this oath."

Q. "Did you ever say to any person, 'I have been applied to, to be a witness against the Princess of Wales,' or words to that effect?"

A. "Never."

Q. "Did you ever say to Mr. Johnson, or any other person, in a stage coach, in England, 'have had considerable advantages offered to me, if I would be a witness against the Princess of Wales,' or to that effect?"

A. "I lay my head or my life there, this offer has never been made to me by any one."

Q. "The question is not whether an offer was ever

made to you, but whether you have said that an offer was made to you?"

A. "I lay my life I have never said so."

Q. "Did you ever say to Mr. Johnson, in stage coach that you had been offered a sum of money, or a situation under government, for giving evidence against the Princess of Wales any where?"

A. "But if I do not know even the name of this Johnson."

Q. "Did you ever say to any person, in a stage coach, that you had been offered a sum of money, or a situation under government, for giving evidence against the Princess of Wales?"

A. "I lay down my life if this be true; and to you, I will answer no more, because you ask me things I have never dreamed about; things that have never entered my head."

Q. "Had you ever any conversation with anybody, in a stage coach, respecting her Royal Highness, the Princess of Wales?"

A. "I never spoke about the business of the Princess of Wales in a stage coach."

Mr. Brougham stated, that in putting the questions which he had proposed to the witness, he had not done so under the slightest suspicion that any person had offered him a place under government, but with another view, which might be perceived.

At all events impeaching witnesses were not later called but the second time Majocchi was recalled impeaching questions were propounded and immediately thereafter supported by evidence.

The records shows:

Theodora Majocchi was then again called and examined by the Lords as follows through the interpretation of Marchese di Spineto.

Questions were propounded at the request of Mr. Brougham the purport of which sought to show by the witness that he, while in Italy in the service of the Princess, had seen and talked with one Carrington, English servant to a Sir William Gell who was also there; that he had then told said Carrington that one Baron Omptedo had employed someone to get the keys of the Princess at Como in order to have false ones made from them; that the person employed by the said Baron Omptedo had confessed this to the police, and that he, Majocchi, had said he would kill him like a dog.

All this Majocchi categorically denied.

Whereupon William Carrington was placed on the stand, examined directly by the defense.

Direct examination of William Carrington:

William Carrington was then again called in, and further examined by Dr. Lushington.

Q. "What did you hear Majocchi say respecting the Baron Ompteda?"

A. "He told me that Baron Ompteda was on a visit to her Royal Highness."

Q. "Was that Theodora Majocchi?"

A. "Theodora Majocchi."

Q. "Was he in the Queen's service?"

A. "He was."

Q. "What did he tell you respecting the Baron Ompteda?"

A. "He told me, that Baron Ompteda was on a visit to her Royal Highness, and that he had employed the postilion and the chamber-maid to procure the keys of her Royal Highness's rooms to get false keys made."

Mr. Attorney-General objected to the form of the examination.

Dr. Lushington. "Did Majocchi tell you that Ompteda had employed some one to get the keys belonging

to the Princess at Como, in order to get false ones made?"

A. "He did."

Q. "Did Majocchi ever tell you that a person had confessed that he had been so employed, and was discharged in consequence?"

A. "He did."

Q. "Did Majocchi ever tell you, that if the Princess would have allowed him he would have killed him like a dog?"

A. "He did."

Q. "Killed whom?"

A. "Baron Ompteda."

Q. "Did Majocchi state, that Baron Ompteda was very ungrateful, after he had so long ate and drank in the Princess's service?"

A. "He did."

The foregoing constituted the evidence upon which the impeachment of Majocchi was founded.

The following is a type of the many witnesses and of their evidence which was presented against the Queen. A portion of the direct examination for the crown is here given.

Testimony of Luigi Goldini, a workman.

Portion of direct examination.

Q. "When you opened a door whom did you see?"

A. "I saw the Baron and the Princess, who were both sitting."

Q. "Whom do you mean by the Baron?"

A. "Baron Bergami."

Q. "On what were the Baron and the Princess sitting?"

A. "They were sitting both together, the Baron had his right arm around the neck of the Princess."

Q. "What were they sitting upon?"

A. "Whether it was a sofa, whether it was an easy chair, whether it was a small bed, I do not answer, because I was there only a moment, I was confused."

Q. "How was the Princess dressed as to her bosom?"

A. "She was uncovered so." (Passing his hand across his breast.)

Q. "In what position was the Princess, can you describe that?"

A. "She was sitting."

Q. "Was any one else in the room besides the Baron and the Princess?"

A. "I saw no one else."

Q. "When you opened the door, what did the Baron do?"

A. "He took away his arm from the neck of the Princess, got up, and told me what do you want from here, you dog."

Q. "What did you say to the Baron?"

A. "I told him you must excuse me, Signor Baron; I came here to look after the fattore, for I have got so many men, and I want the materials to make the men work."

Q. "Did the Baron make any reply to that?"

A. "He told me that that was not the apartment of the factor."

Q. "Did you ever see after that, the Princess and Bergami together at any time?"

A. "I saw them another time."

Q. "Where were they when you saw them together?"

A. "They were coming down the stairs arm-in-arm."

Q. "Did you see them do anything to each other at that time?"

A. "I saw them descending, and standing just for a moment on the stairs, for I was crossing."

Cross-examination by Mr. Tindal for the Queen:

Q. "Whom did you first inform of what you knew upon this subject?"

A. "The first time I mentioned it to the son of the factor on the same day."

Q. "Did you go to Milan to give this information?"

A. "I did."

Q. "Who applied to you to take you there?"

A. "A man of the name of Tagliabue."

Q. "When was it?"

A. "In the year 1817 or 1818; thereabouts."

Q. "What did you receive for going to Milan?"

A. "I received ten livres per day to pay my expenses."

Q. "Do you mean to swear that you did not receive more for going to Milan?"

A. "I do."

Q. "When were you applied to, to come to England?"

A. "Last winter, towards the end of March or the beginning of April."

Q. "Do you mean the March or April of this year, 1820?"

A. "Yes."

Q. "Who applied to you?"

A. "The same Tagliabue who called upon me with the letter of the Advocate Vimercati."

Q. "Did you see Vimercati again before you came to England?"

A. "I did."

Q. "Did you make any agreement with Vimercati as to your coming to England?"

A. "I made an agreement that he should give me ten livres per day."

Q. "Was that besides your expenses?"

A. "They are for the expenses for living."

Q. "Who paid your expenses in coming over to England?"

A. "Our courier gave us our ten livres every day."

Q. "Who pays your expenses here?"

A. "I do not know that."

Q. "Where are you staying?"

A. "I am out at a little distance from this place, but I do not know where it is."

Q. "Are there several of the other witnesses with you?"

A. "I see a good many of them, I see witnesses, I see strangers, I see people, there are many."

Q. "Have you seen Theodora Majocchi among them?"

A. "Yes, in London."

Q. "Do you know him?"

A. "I have known him since my arrival here; I had never seen him."

Q. "You have seen a good deal of him since that, have not you?"

A. "No, he was in one lodging, I was in another, and I have known him since my arrival in England."

The same manner of attack was made in cross-examination upon this witness as throughout the remainder of this case.

One Louisa Demont, another witness for the crown, who had been a servant in her household in Italy gave a volume of damaging evidence against the Queen. In the main, Louisa's testimony went to the point of and substantiated in the main the general allegations of the foregoing bill with great detail.

The cross-examination by Mr. Williams, for the Queen through an interpreter of this witness was almost entirely devoted to impeaching said witness and in showing prejudice and that she had made previous contradictory

statements relative to the character of the Queen when the latter was Princess, rather than attacking her story itself.

In Louisa Demont's testimony in chief on direct examination, two portions are first hereafter given for the purpose of rendering examples of the type of damaging evidence she furnished against the Queen and later to be able to show how her credibility was attacked.

Direct examination of Louisa Demont:

Q. "You have said that you have seen Bergami present in the dressing-room when the Princess was making her toilet; was that once or more than once, or how?"

A. "Several times."

Q. "In what state of her Royal Highness's dress; when she was little dressed or much dressed, or how?"

A. "Sometime she was dressed, sometimes she was not."

Q. "Did he go in only for a moment, and come out again, or did he remain for any time?"

A. "He went in and out."

Q. "Do you remember ever seeing Bergami at night in the passage of which you have made mentioned?"

A. "I do."

Q. "Where was her Royal Highness at that time?"

A. "In her bed-room."

Q. "Was she dressed or undressed, or in what state?"

A. "She was undressed."

Q. "Where were you standing?"

A. "I was near to the door of her Royal Highness."

Q. "Where did you see Bergami?"

A. "I saw Bergami come out of his room, and come into the passage."

Q. "In what direction; towards the Princess's room, or how?"

A. "He was going towards the bed-room of her Royal Highness."

Q. "What was the state of Bergami's dress at the time you saw him in the passage going towards the bed-room of her Royal Highness?"

A. "He was not dressed."

Q. "When you say he was not dressed, what do you mean; what had he on?"

A. "He was not dressed at all."

And then again, referring to portraits made of the Princess:

Q. "Did you ever see any other picture painted of her Royal Highness upon that voyage, besides the one you have mentioned at Augusta?"

A. "I have seen another portrait."

Q. "What was the other portrait; in what character?"

A. "As a penitent Magdalen."

Q. "Do you remember in what place at Sicily?"

A. "At Augusta."

Q. "How much of the person of her Royal Highness did that picture represent; the head, or more than the head?"

A. "As far as the waist."

Q. "How was the upper part of the person, covered or uncovered, in the picture?"

A. "Uncovered."

Q. "How was the breast; was that covered or uncovered?"

A. "Uncovered."

The attack made upon Louisa Demont by the defense consisted, as usual, in impeaching her credibility, finding conflicts in her statements, and showing spite and interest.

To proceed:

Louisa Demont was then again called in and further examined by the Lords, through the interpretation of Mr. Pinaro, the questions being suggested by Mr. Williams for the Queen.

Cross-examination.

Q. "Are you acquainted with a woman of the name of Fanchette Martigner?"

A. "I believe not."

Q. "Do you know a man of the name of Henry Martigner?"

A. "I do not recollect any such name."

Q. "Do you know a place in Switzerland called Morje?"

A. "Yes."

Q. "The woman to whom the question refers is a milliner at that place?"

A. "I know a person, a Marchande de Modes of the name of Martigni, not Martigner."

The witness was apparently, depending upon the technicality of pronunciation, attempting to avoid answering these questions.

Q. "Do you remember seeing that woman in April 1818?"

A. "I have seen her several times, but I do not remember in what month."

Q. "In the year 1818?"

A. "I do not recollect; but I may have seen her in the course of that year."

Q. "Do you remember sending for that woman to alter a bonnet for you?"

A. "I can not recollect my sending for her, because I did not reside at Morje."

Q. "Did you see her upon the subject of a bonnet in any part of the year 1818?"

A. "I may have seen her, but I do not positively recollect whether I did nor not."

Q. "Do you know the woman of whom you are reminded?"

A. "I know this woman, Madam Martigni."

Q. "Had you not some conversation with her in the year 1818 about the Princess of Wales?"

A. "As I do not recollect seeing her in the course of that year, I do not recollect having any conversation with her."

Q. "Did you not see this woman after you had left the Princess's service?"

A. "Yes, I saw her afterwards."

Q. "Had you not then some conversation respecting the Princess of Wales?"

A. "I do not recollect whether I had any conversation with her; it may be, but I do not recollect."

Q. "Do you not remember this woman, Martigni, speaking on the subject of your journal?"

A. "I do not at all recollect her speaking to me on the subject of my journal."

Q. "Do you mean to say that you did not hold a conversation with this woman, Martigni, on the subject of your journal?"

This cross-examination of Louisa Demont, a goodly portion of which is here given, for years stood as perhaps the greatest example of its kind in the history of great English trials. These were all questions applied for the purpose of subsequent impeachment of the witness. They inquired into previous contradictory statements made by the witness. The reader may note the conduct of counsel here as it relates to the rules applying to cross-examination regarding previous contradictory statements heretofore in this volume set out.

A. "I may have had a conversation with her, but I do not recollect; it may be."

Q. "Do you not remember this woman speaking with you as to the conduct of the Princess of Wales?"

A. "I do not recollect."

Witness was consistently failing to remember and avoiding direct answers.

Q. "Do you recollect saying any thing about the persons that surrounded the Princess of Wales?"

A. "I do not recollect; I have often spoken about the Princess, but not about persons who surrounded her, who were of her suite."

Q. "Did not this woman, Martigni, ask a question of you respecting the character of the Princess of Wales?"

A. "I do not recollect having had a conversation with her on that subject; it may be, but I do not at all recollect."

Q. "You say you recollect being at Morje: do you recollect having a bonnet mended whilst you was there?"

The Solicitor-General objected to this question: she had not said that she had been at Morje.

Q. "Do you remember being at Morje?"

A. "Yes, I have been at Morje several times."

Q. "Do you not remember this woman, Martigni, putting this question, 'Whether the Princess of Wales was not a woman of intrigue, a femme gallante'?"

A. "I do not at all recollect; I do not recollect having had any conversation with this woman upon the subject of the Princess."

Q. "Do you mean to say that you had not this conversation, and that the woman Martigni did not put the question now asked?"

A. "I do not at all recollect."

Q. "Will you say that it did not pass, that the question was not put to you?"

A. "I do not at all recollect whether this question was put to me; I have not the least idea of it."

Q. "Do you remember at that time becoming angry on the subject of the Princess's conduct being mentioned?"

A. "I do not recollect; I do not remember this conversation; I have not the least idea of it."

Q. "Do you remember your saying at that time, to this woman Martigni, that it was all a calumny, and that it was her (the Princess's) enemies that spread such rumors?"

A. "I do not recollect anything like that; I do not recollect it at all."

Q. "Will you swear that you did not say so?"

A. "I will not swear it, but I have not the least idea of it; before I was put upon my oath, I never said any thing of what passed in the house of her Royal Highness."

Witness declined to swear it was not so, anticipating no doubt the conversation would be proved against her. She fell back on failure to recall.

Counsel for the Queen had succeeded in putting fairly competent impeaching questions.

Q. "If that be so, do you mean now to represent that you did not use the language just put to you, or to that effect?"

A. "I have not the least idea of such a conversation; I do not recollect it at all."

Q. "Will you swear you did not say so?"

A. "I will not swear it, because I do not recollect it at all; I have not the least idea of it."

Q. "Did you not say to this Madam Martigni, that from the time the Princess left England she was surrounded by spies?"

A. "I never could have said so, because I myself never saw any spies."

Q. "Will you then swear that you did not say that which was just put to you?"

A. "I will not swear it, but I do not recollect having ever said it."

Q. "Did you not say just now you could not have said it, because you never saw or knew any thing of spies?"

A. "I do not remember ever saying so at all; I do not recollect having this conversation, I have no idea of it."

Q. "You were understood to say this moment you could not have said it, because you knew nothing of spies?"

A. "I do not believe I ever said so at all."

Q. "Will you swear you did not say so?"

A. "I will not swear it, but I do not think I ever said it."

This cross-examiner pursued the proper tactics relentlessly. He persistently insisted that witness either swear she did not utter these sentiments or say that she could not under oath deny them. There is always a doubt in the mind of a judge or jury as to the veracity of a witness thus accused when he relies on his absence of any recollection thereof.

For instance, if one were charged with stealing an article of value however long since past, if he were innocent there would be no doubt at all in his mind or a moment's hesitation in his reply. True he might not recollect everything that occurred to him within the specified period of time—perhaps very little—but he would know that he had not stolen the article mentioned.

Here the witness whose recollections concerning her relationship with the Princess had been very keen and her responses thereto exceedingly prompt on direct ex-

amination, on cross-examination failed to remember conversations of a nature inconsistent with her expressed thought. Of a certainty she could not have been expected to remember all conversations had by her from time to time in years then past but her position was such that she should have been able categorically to deny the inferences contained in the questions were they not true.

Q. "Did you not say in addition, to this same woman, that the Princess was very unfortunate?"

A. "I do not recollect this conversation at all."

Q. "That the most simple actions of her life were always misinterpreted?"

A. "I do not recollect ever saying so; I do not remember this conversation at all."

Q. "Will you swear that this conversation, or any part of it, passed in the year 1818?"

A. "I can not swear, but I can not recollect; I do not recollect any thing of it, I have no idea of it."

Q. "Do you remember being at Madame Jaquereau on a visit of Morje?"

A. "Yes."

Q. "When was that?"

A. "I have been there several times."

Q. "The question refers to the year 1818?"

A. "I have been several times there after quitting the service of the Princess, but I do not recollect at what periods."

Q. "Were not you there, upon a visit to the person just mentioned to you, in the year 1818?"

A. "Yes, I was there in the year 1818."

Q. "And in that year 1818, when you were on a visit, had you not a bonnet altered or repaired by Madame Martigni?"

A. "It may be, but I do not positively recollect it."

Q. "Have you no memory about your bonnet being repaired or altered by this woman?"

A. "I have had several bonnets altered by Madame Martigni."

Q. "Did you not tell Madame Martigni that you had always been about the person of the Princess?"

A. "I do not at all recollect this conversation."

Q. "Will you swear that Madame Martigni did not remark to you, that as you had always been about the person of the Princess, you must have observed all her actions?"

A. "I do not recollect this conversation; it may be, but—but I have not the least idea of it."

Q. "Did not Madam Martigni inquire particularly of you, whether you had seen anything unchaste in the conduct of the Princess?"

A. "I do not recollect at all having had this conversation; I have not the least idea of it."

Q. "Will you swear it did not take place in those very words, or to that effect?"

A. "I can not swear it, I do not recollect it at all."

Q. "Will you swear that you did not reply to this effect, 'My God! never in my life; it is impossible for any body to be more virtuous than the Princess of Wales'?"

A. "I do not recollect; I can not recollect having any conversation on the subject with Madame Martigni."

Q. "Will you swear you had not any conversation to that effect with Madame Martigni?"

A. "I can not swear it, but I have not the least recollection of it, I have not the least idea of it."

Q. "Do you believe you have used those expressions, or expressions to that effect, in answer to a question put by Madame Martigni?"

A. "I do not recollect such a question; but if such a

question took place, I do not believe I made such an answer."

Q. "Did you not also say to Madame Martigni, that in all her persecutions, she, the Princess, had no friend but the old King?"

The Solicitor-General objected to this question. His learned friends had no right to assume as fact the conversation between Madame Martigni and the witness about the conduct of the Princess of Wales. He did assume it as fact, however, by the mode of putting this last question, namely, "Did you not also?"

The Lord-Chancellor observed, that the question might be asked, omitting the word "also," to which the Solicitor-General had just objected. He would here just remark to Mr. Williams, that he was to attend, not only to the shaping and wording of the questions, but to the manner and demeanor of them.

The question was then repeated, so amended.

A. "I have not the least idea whatever of this conversation, I do not recollect it."

Q. "Will you swear you did not say so?"

A. "I will not swear it, but I do not believe that I ever said so."

The defense had succeeded pretty well in establishing ground for belief that the witness was prejudiced and had testified to opinions she previously either had not held or at least had discounted, provided impeaching testimony could be introduced:

It followed immediately on direct examination given in full.

Fanchette Martigner was then called in, and having been sworn, was examined by Mr. Williams.

Q. "Are you the wife of Henry Martigner?"

A. "Yes."

Q. "Of what place?"

A. "Of Morje."

Q. "Do you keep a milliner's shop there?"

A. "Yes."

Q. "Do you know Louisa Demont?"

A. "Yes."

Q. "Do you remember asking her any questions respecting the Princess of Wales and her conduct?"

A. "The first time I spoke to her about her voyage, because I had seen her journal."

Q. "The question refers to the time when you had the work to do for Demont?"

A. "I understand so."

Q. "Did you ask Demont any question respecting the conduct of the Princess of Wales, or respecting the Princess of Wales generally?"

A. "Yes."

Q. "What was the question which you put to Demont?"

A. "I observed to Mademoiselle Demont that the Princess of Wales was a femme libertine et galante; and I said so frankly, for such was my opinion."

Q. "What answer did Demont make to your observation?"

A. "She put herself in a great passion, and said it was nothing but calumnies invented by her enemies in order to ruin her."

Q. "Did Demont say more?"

A. "She said everything that was good of the Princess; that she had never observed any thing about the Princess, or of the Princess, but what was good."

Q. "Do you remember Demont saying any thing about spies?"

A. "She told me that ever since the Princess had quitted England, she had always been surrounded with spies; and she said something more, that every action

that she did, even the simplest actions, and with the best intention, were misinterpreted; that the Princess knew very well that she was surrounded by spies, but that she did no action but what she was willing that all the world should know."

Q. "Do you remember yourself saying any thing to Demont about Demont being about the person of the Princess?"

A. "I only recollect what I have said."

Q. "Do you remember inquiring of Demont any thing about the chastity of the Princess?"

A. "Yes, I asked her whether she had observed any thing of the Princess."

Q. "What did she answer?"

A. "She answered, no, that she had never observed any thing; and further observed, 'it is impossible to be more virtuous than my Princess.' "

Q. "Do you remember any thing being said by Demont about the late King, about the old King?"

A. "She said, in the conversation, that the old King was the only support the Princess had."

Q. "You have stated that you had, on several occasions, seen Demont; did you know her well, and did Demont know you well?"

A. "Yes."

The foregoing direct examination is shown to furnish an example of the result to be obtained by properly laying impeaching questions on a previous cross-examination. Of course the exact forms of procedure have changed and in different American States different rules prevail and vary but the principles remain largely the same.

The Solicitor General, however, did not permit it to rest at that but launched into a lengthy cross-examination on his own part, a portion of which is given.

Cross-examination of Fanchette Martigner by the Solicitor General:

Q. "What is it that leads you particularly to remember that this conversation took place in the year 1818?"

A. "Because I saw her depositions in the public papers, and then I openly showed, or manifested, or expressed my indignation, that she could have said what she had said to me and afterwards have made such depositions."

Q. "Will you have the goodness to answer the question, which was, 'what leads you to remember that this took place in the year 1818?' "

This exemplifies the rules herein laid down never to permit a witness to avoid giving a direct answer to a question.

A. "Because she employed me in altering a hat or bonnet, and she took it back from me on the 22d of April, 1818, as it appears by entries in my day-book."

Q. "Was that the year in which your husband fell into embarrassed circumstances?"

Mr. Williams objected to the question, as assuming a fact not proved.

Q. "Did your husband in that year, and if in that year, in what part of that year, fall into embarrassed circumstances?"

A. "My husband never was in embarrassed circumstances."

Q. "Do you mean to swear that your husband was never a bankrupt?"

A. "My God! yes; neither he nor I."

Q. "How far is it from Morje to Colombier, where you live?"

A. "About a short league."

Q. "How many times in the course of the year might you have seen Demont?"

A. "I saw her several times, but only spoke to her twice."

Q. "How many times did you see her in the year 1817?"

A. "I did not see her at all."

Q. "How long was it before the month of April 1818 that you had seen her?"

A. "I did not see her before; I knew she was in the country, or in the neighborhood, but that was the first time I saw her."

Q. "Did you ever see her upon any occasion before the month of April 1818?"

A. "I had seen her before she entered into the service of the Princess; but after her quitting the service, for the first time I saw her in the month of April 1818, eight days before I did that work about her hat."

Q. "When was it that you saw her before she went into the service of her Royal Highness?"

A. "I have seen her several times at Morje; she came to my shop, to my warehouse, to buy different things."

Q. "How long is that ago?"

A. "I can not recollect the precise time, it was when Mademoiselle Demont was quite young, and she was learning to make hats, and to do other work."

Q. "Was it as much as five, or six, or ten years ago?"

A. "I can not positively tell, I only know that she was then quite young, and that she was at Morje to learn to work; they might write to Morje to know."

Q. "Do you mean to swear you can not tell whether it was five or ten years ago?"

A. "Yes, I can not swear it, because I do not know."

Q. "Can you state whether it is three years or ten?"

A. "I can not say, I do not know, I swear I know

nothing about it; this Mademoiselle Redar might be written to and will give the information."

Q. "Do you mean upon the oath you have taken to swear you do not know whether it is three or ten years ago?"

A. "Yes, I can swear it, because I can not swear what I do not know, what I do not recollect."

Q. "Who was present, besides yourself and Demont, at the time this conversation you have spoken of took place?"

A. "The Demoiselles Jaquereau, the two sisters."

Q. "Where are the Demoiselles Jaquereau now?"

A. "One of them is at Nismes, and the other is at her country house at Morje."

Q. "Did this conversation take place in the house of Mademoiselle Jaquereau, or in your own shop?"

A. "At the house of the Demoiselles Jaquereau."

Q. "Was Mademoiselle Demont living there at that time?"

A. "She was there upon a visit."

Q. "Having stated that Mademoiselle Jaquereau was there at the time, do you mean to state that the converversation took place under such circumstances, that Mademoiselle Jaquereau must have heard it?"

A. "They heard almost the whole of it, they were coming in and going out of the room alternately, yet they can recollect the greatest part of that conversation; but there are several particulars of that conversation which they well recollect, and even they found fault with my making that observation to Mademoiselle Demont."

The proponents of the bill were trying themselves to lay impeaching questions; in other words trying to secure the name of some one present other than Demont and Madame Martigner who might perhaps if found contradict the latter's statements also.

Q. "When were you examined first as to what passed in that conversation?"

A. "Do you mean examined by those gentlemen who came to Switzerland; it is about two weeks ago, a fortnight ago."

Q. "What agreement have you or your husband made for compensation or reward for coming here?"

A. "My husband has had nothing to do with that; these gentlemen told me that we should be indemnified in a just and fair manner by the Government of this country."

Practically all of the witnesses presented by the crown were of foreign birth and of poor means. Consequently having thus to come great distances and at great expense, unusual opportunity to show improper motives was afforded the defense—especially since service could not have been obtained against them by subpoena and they could not have been compelled to attend the trial.

Q. "Has no sum been mentioned?"

A. "As I did not know these gentlemen, I would not trust to their word, because two years ago an Englishman, called Addison, occasioned me a loss of fifty Louis; on this account they have deposited the sum of 100*s.* at a banker's called Messrs. Moret, as a security for their promise, and they have a receipt for that sum."

Q. "Is that 100*s.* which is deposited as a security for their promise, to be paid to you?"

A. "This sum can not be paid to me without an order from those gentlemen, because the sum has only been placed there as a security for their promise."

Q. "Is the promise they have made to you a promise that you shall receive 100*s.*?"

A. "No, what government will grant as just and

fair; it is a guarantee of that promise, because they said it was not their intention to buy witnesses."

Q. "Do you mean to swear, that since you came to this country, or since you were first spoken to, no promise had been made to you or to your husband?"

A. "By nobody, I swear it, I tell the exact truth."

Q. "Have you received any thing?"

A. "I have received 70*s.* sterling on account, for which I gave a receipt, because there is a suit depending there which will be decided against me, or may be decided against me, if I am not there on the 24th of the next month; not knowing how low long I should have to remain in London, I would not leave my affairs without something to depend upon, and I have only received that as on account."

Q. "Besides that, have your expenses been paid, or did you pay your own expenses upon the journey?"

A. "Those gentlemen paid the expenses of the journey."

This interrogation of Fanchette Martigner was very splendidly achieved. It shows how much good can be accomplished and how much harm undone by an effective cross-examination. Even though Louisa Demont was largely discredited in so far as her contradictory statements related to her credibility, nevertheless the solicitor general captured a strong witness and made her admit she could not remember many things.

And then later Louisa Demont was recalled to the stand and her cross-examination continued:

Cross-examination:

Q. "You are understood to have said, that you entered into the service of the Princess in the year 1814?"

A. "Yes."

Q. "And remained in it until the year 1817?"

A. "Yes."

Q. "Until the month of November, or thereabouts, in that year, did you not?"

A. "Yes."

Q. "Did you quit the Princess's service of your own accord, or were you discharged?"

A. "I was discharged."

Q. "Were you not discharged for saying something which you afterwards admitted to be false?"

A. "Yes, in fact it was not true."

Motive for malice against the Princess by this witness was here introduced and that after being discharged she was left in destitute circumstances and her motive for revenge joined with her bargaining for money.

Q. "Did you go into any other service after you were discharged from the Princess's, before you came to England?"

A. "No."

Q. "Did not your money fail you before you came to England?"

A. "No."

Q. "You mean to say that you were not short of money before you came to England, do you?"

A. "No, because I had money in Switzerland, and I might have got it if I had been in want of it, if I had been willing."

Q. "Did you never say that you were getting short of money?"

A. "I do not remember ever saying it; I have funds in Switzerland, and I live upon the interest of them."

Q. "Did you never represent that you had failed to save money in the service of the Princess?"

A. "I do not remember ever saying so."

Q. "Will you swear that you never represented that to anybody?"

A. "I can not swear it, but I do not recollect ever saying it."

Q. "Or representing it?"

A. "I do not recollect it."

Q. "Will you swear that you have not?"

A. "I will not swear it, but I do not recollect it."

Q. "You were applied to by some person or other, very soon after you were discharged from the Princess, were you not?"

A. "Not very soon after."

Q. "For example, within half a year?"

A. "Not six months; it was more than six months, it was nearly one year after I had left her service."

Q. "You are understood to say, you were applied to, to know what you had to say with respect to the Princess, is not that so?"

A. "One year after I had left her service."

Q. "Did or did not somebody apply to you, in order to know what you had to say with respect to the Princess, about a year after you left the service of her Royal Highness, or at whatever period?"

A. "One year after."

This manner of cross-interrogation continued for days. Here is an example of what later followed relating to the proper introduction of, or cross-questioning upon, an instrument written by the witness:

Continuing the cross-examination of Louisa Demont.

Q. "Is that your writing?" (A letter being shown to witness, folded so that she might see the last line and a half.)

A. "It is not exactly like my writing."

Q. "Do you believe it to be your writing or not?"

A. "It is not exactly like my hand-writing."

Q. "Do you believe it to be your hand-writing?"

A. "I do not recollect having written it; nor do I think that it is exactly like my character."

Q. "Do you believe it to be your hand-writing, aye or no?"

A. "I do not think it is exactly my hand-writing; I do not recollect having written it."

Q. "Do you believe it to be your hand-writing, aye or no?"

A. "I can not decide whether it is my hand-writing; it is not quite like it; and I do not recollect having written it."

Q. "Do you believe it, aye or no?"

A. "I can not say yes or no; because it is not exactly like my hand-writing, and I do not recollect having written it."

Q. "Do you believe it to be your writing?"

A. "It is not exactly like my hand-writing."

Q. "Do you believe it to be your writing?"

A. "I can not tell what else to answer; I can not answer a thing of which I am not sure."

The witness, while within her rights, was not asserting something when she was not sure of it; nevertheless Demont has resorted too frequently to the ofttimes damaging answer, "I do not recollect."

This manner of questioning, however, was somewhat improper as will be shown.

By a Lord. "You are not asked whether you know it to be yours, but whether you believe it to be yours?"

A. "I can not say positively that it is not my hand-writing, but I do not believe it is."

Mr. Williams. "How much of that paper that has been before you so long, was submitted to your eye during the time you have given the answers you have given?"

A. "A line and a half."

Q. "Before it was folded down, as it now is, did you not see higher up in the paper several lines more than that line and a half?"

A. "When they presented it to me, there I saw something more, but I do not recollect how many lines, nor what it was."

Q. "Do you mean to say, that when the Counsel showed you the paper, before it was in the hands of the Interpreter, it was not near enough for you to see the writing?"

A. "I do not know whether it was near enough; I have seen the writing, but not distinguished what the writing was."

Q. "Was it not, when in the hand of the Counsel, near enough for you to see the writing, and the character of the writing?"

A. "I have merely half seen the character."

Q. "Was not it near enough to you for you to see it?"

A. "It was near enough, because I have seen it, but I have only partly seen it; confusedly I have seen the hand-writing at a distance, but have not been able to distinguish."

Q. "Why did you not complain, when the Counsel held it in his hand, that it was not near enough for you to see it?"

A. "Because the Counsel gave it to you." (Addressing herself to the Interpreter.)

Q. "Do you mean to represent that the Counsel did not hold it before you long enough for you to see the character before he handed it to the Interpreter?"

A. "I could not see the character distinctly at that distance."

At length the counsel began asking the witness if she did not write certain statements in a letter or let-

ters. The Attorney-General finally objected to this, as will be seen, which objection was sustained following an interesting procedure during the tracing of authorities back into the foundations of the Common Law.

Q. "Do you remember never having said, or written, or represented, that if the Princess could read your heart, she would then be convinced of the infinite respect, the unlimited attachment, and the perfect affection, you entertained for her august person?"

A. "I recollect to have written several times to my sister, but I do not recollect the contents of my letter."

Q. "Will you swear to these very expressions, beginning with the words, 'Oh! God, I would surrender half my life if she could read my heart?' "

A. "I may have used these expressions, because at that time I was much attached to her Royal Highness."

Q. "That was some time after you had been discharged was it not?"

A. "It was not very long after."

Q. "Have you not to the same sister written, 'How often in a numerous circle, have I, with enthusiasm, enumerated her great qualities, her rare talents, her mildness, her patience, her charity, in short, all the perfections which she possesses in so eminent a degree?' "

A. "I do not recollect whether I have made use of those expressions, but I have written to my sister, and I have spoken of the manner in which she conducted herself towards me."

Q. "Have you not used the very expressions that have been just put to you?"

A. "I do not recollect exactly whether I have used these same expressions, but I have written in the same sense; I do not recollect the expressions."

Q. "Then you will not swear that you have not used those very expressions?"

A. "I will not answer that I have made use of them, nor that I have not made use of them."

Witness was desperately avoiding a direct answer dreading to admit that which she feared would be subsequently proved.

Counsel continued quoting apparently from her letters until at length the Attorney-General stated that he had not interposed when the counsel against the bill had asked as to particular expressions used by the witness, but that now that he was proceeding to read a long letter, he felt it necessary to submit, that the regular course was for him to produce it, and put it into the hand of the witness, and to ask whether it was her handwriting or not; and that he had no right, without having so done, to read the contents of a letter which was assumed to exist.

Mr. Williams submitted that he had been and must have been perfectly in order. In cross-examinations there were two modes which an advocate had a right to take, with a view to try the veracity of a witness. First, as in the case before their Lordships, in parole evidence, supposing the witness to have made any particular statement, at any particular time, or any given number of persons, which was untrue, it was competent to give in evidence not one word in contradiction, unless the witness had been previously asked as to that statement, or generally examined upon that subject. Not till the witness should be so examined, and the answer, whatever it might be, was obtained, was it competent for the cross-examining advocate to call one of the numerous persons assumed to be in a condition to contradict the witness. The analogy with this case was close and obvious. He would rather wish the witness not to be present.

The Lord Chancellor. "That is quite right. Let the witness withdraw." (She withdrew accordingly.)

After argument the counsel were directed to withdraw, and the following questions were then put to the learned Judges by the House:

"Whether, in the Courts below, a party on cross-examination would be allowed to represent, in the statement of a question, the contents of a letter, and to ask the witness whether the witness wrote a letter to any person with such contents, or contents to the like effect, without having first shown to the witness the letter, and having asked that witness whether the witness wrote that letter, and his admitting that he wrote such letter?

"Secondly, whether, when a letter is produced in the Courts below, the Court would allow a witness to be asked, upon showing the witness only a part of, or one or more lines of such letter, and not the whole of it, whether he wrote such part, or such one or more lines; and in case the witness shall not admit that he did or did not write the same, the witness can be examined to the contents of such letter?"

The questions being handed to the Lord Chief Justice, the learned Judges begged leave to retire.

After a short time the learned Judges returned.

Lord Chief Justice Abbott. "My Lords, the Judges have conferred upon the questions propounded to them by your Lordships:

"The Judges are of opinion that the question must be answered by them in the negative; and the reason and foundation of our opinion is shortly this—The contents of every written paper are, according to the ordinary and well-established rules of evidence, to be proved by the paper itself, and by that alone, if the paper be in existence; the proper course, therefore, my Lords, is, to ask the witness whether or no that letter is of the handwriting of the witness: if the witness admits it is of his or her hand-writing, the cross-examining counsel may,

at his proper season, read that letter as evidence; and when the letter is produced, then, my Lords, the whole of the letter is made evidence. One of the reasons for the rule requiring the production of written instruments, is in order that the court may be possessed of the whole. If the course which is here proposed should be followed, the cross-examining counsel may put the court in possession only of a part of the contents of the written paper, and thus the court may never be in possession of the whole, though it may happen that the whole, if produced, may have an effect very different from that which might be produced by a statement of a part.

"My Lords, concerning the next question proposed by your Lordships, is, 'Whether, when a letter is produced in the courts below, the court would allow the witness to be asked, whether, showing the witness only a part, or one or more lines of such letter, and not the whole of it, whether he wrote such part or such one or more lines; and if he should not admit that he did or did not write such part, whether he can be examined to the contents of such letter?' The Judges beg your Lordships' permission to divide this question into two parts: in answer to the first part, namely, 'Whether, when a letter is produced in the courts below, the court would allow a witness to be asked, showing the witness only a part, or one or more lines of such letter, and not the whole of it, whether he wrote such part.' The Judges are of opinion, that that question should be answered by them in the affirmative to the question in that form; but, in answer to the latter part, which is this, 'and in case the witness shall not admit that he did or did not write such part, whether he can be examined to the contents of such letter?' that the Learned Judges answer in the negative, for the reason I have already given; namely, that the paper itself is to be produced, in order that the whole

may be seen, and the one part explained by the other.''

The Counsel were again called in and so informed.

The witness was again called in.

Mr. Williams. ''Is that your hand-writing?'' (A letter being put into the hands of the witness.)

A. ''Yes.''

Q. ''Is that side your writing?''

A. ''It is my writing.''

Q. ''Take the next—is the next page your writing?''

A. ''Yes.''

Q. ''And the next?''

A. ''Yes.''

Q. ''Even to the end?''

A. ''Yes, to the end.''

Q. ''And the address?''

A. ''Yes.''

Q. ''And the date and the place?''

A. ''Yes.''

Q. ''Look at that?'' (Another letter shown to the witness.) ''Is that first page your writing?''

A. ''Yes.''

Q. ''And the next?''

A. ''Yes.''

Q. ''And the last?''

A. ''Yes.''

Q. ''The whole?''

A. ''To the end.''

Q. ''Is the first page of that letter your writing; the date and altogether?'' (Another letter being shown to the witness.)

A. ''Yes.''

Q. ''And the next page?''

A. ''Yes.''

Q. ''Name and all?''

A. ''Yes, all mine.''

The letters were severally handed in, and marked by the Clerk Assistant.

Mr. Attorney-General objected to any questions being put as to the contents of the letters, and submitted that the written instruments must be produced, and must speak for themselves—which objection was sustained after a submission again to the learned Judges thereof after the manner heretofore shown thereon rendered in the absence of the witness.

Whereupon the witness was again called in and after a few preliminary questions the Attorney-General for the Queen tendered the letters in evidence.

The Solicitor-General desired their Lordships might be informed whether the Counsel against the Bill meant to put questions upon the letters after they should have been read.

Mr. Williams, of Counsel for the Queen, stated that he should put a question upon them.

The Attorney-General for the Queen stated, that the reading of the letters would occupy a considerable time, and he was desirous the witness should not have an opportunity of reflecting upon them before the questions were proposed to her upon them. Witness was not withdrawn, however.

On the following day after the intervention of a number of unrelated questions the letters of Louisa Demont were read to the House. This was done under a previous ruling of the house that, "when a witness was cross-examined, and upon the production of a letter to the witness under cross-examination, the witness admits he wrote that letter, the witness can not be examined whether he did or did not, in such letter, make statements such as the counsel shall, by questions addressed to the witness, inquire are or are not made therein, but that the letter itself must be read as the evidence, to

manifest that such statements are or are not contained therein; and, further, that it is the opinion of the House, that in the regular course or proceeding, the letter ought to be read after the Counsel cross-examining shall have opened his case, but that the House will; upon the request of such Counsel, stating that it is expedient for the purpose of his more effectually, in the course of his cross-examination, propounding further questions necessary for the interest of his client, permit such letter to be read, subject to all the consequences of having such letter considered as part of his evidence."

Consequently, whatever its import if so read on cross-examination the defendant became bound by its contents.

Mr. Brougham proposed that the letters should be read first in French by one Interpreter, and then the translation read by the other; the Interpreter who had read the letter holding it in his hand, and stating whether he agreed in the interpretation.

Then a letter in French, signed Louisa Demont, addressed Mademoiselle Mariette Bron, at Pesaro, and dated Colombier, 8th February, 1818, was read.

During the reading of the letter the witness remarked, that a person was named in it who might be exposed by his name being made known; that she wished that no person of whom she had spoken should be exposed.

Mr. Brougham stated, that he had no desire that any person connected with the proceedings before the House, should be introduced by the reading of the letter; and consequently that he had no objection to the name being omitted in the reading or in the copy of the letter, as it might appear upon their Lordships' minutes.

Their Lordships directed that the name should be omitted in entering the letter on the minutes: and the Interpreter was directed, if he should meet with any

other name in reading the letter, not to read it until he had learned from the Counsel whether it was necessary that it should be stated.

Then Mr. Garston, the Interpreter, produced a paper, and was asked:

Mr. Brougham to Mr. Garston. "Have you compared that in your hand with the original?"

A. "I have."

Q. "And have found it to be an accurate translation?"

A. "I have."

The original letter was handed to Mr. Pinario, and the translation was read by Mr. Garston.

The letters of great length need not be given here for illustration save to say with regard to their contents that they supported completely the impeaching questions previously laid as hereinbefore set out.

The defense in this great trial rested their case in chief largely upon the testimony of Lords and Ladies of England and persons of high position, a number of whom had from time to time sojourned with the Princess in Italy, who denied having observed any of the things testified to by the crown witness and who disavowed the existence of any indication of such conditions as expressed in the bill.

At the end of the evidence following the arguments of counsel, the Earl of Liverpool moved, that the Bill be read a third time.

On the division there appeared:—

For the third reading.....108
Against it 99

Majority 9

Lord Dacre then rose amid very vehement cries of "Order;" and as soon as the peers had taken their seats,

he observed, that he had been intrusted with a petition from her Majesty, praying to be heard by counsel against the passing of the Bill.

The Earl of Liverpool rose immediately, and said that he apprehended such a course would be rendered unnecessary by what he was about to state. He could not be ignorant of the state of public feeling with regard to this measure, and it appeared to be the opinion of the House that the Bill should not be read a third time only by a majority of nine votes. Had the third reading been carried by as considerable a number of peers as the second, he and his noble colleagues would have felt it their duty to persevere with the Bill, and to send it down to the other branch of the legislature. In the present state of the country, however, and with the division of sentiment, so nearly balanced, just evinced by their Lordships, they had come to the determination not to proceed further with it. It was his intention, accordingly, to move that the question that the Bill do pass be put on this day six months.

Which was in truth a victory for the Queen. Such a motion under American parliamentary procedure would have been one for indefinite postponement, the passage of which generally kills a bill without a complete change of majority calling for a suspension of rules usually requiring a two-thirds vote.

As it was, the proceedings against the Queen were abandoned November 10, 1820 and the bill never passed or became a law. Queen Caroline Amelia Elizabeth died August 7, 1821.

CHAPTER 22

THE EARL OF CARDIGAN

Another case more recent than those last given which nevertheless shows the gradual ultimate evolution of English procedure and also relates directly to the development of the principles of cross-examination is that of the trial of James Thomas, Earl of Cardigan appealed from an inferior jurisdiction to the British Parliament in 1841. The record of the case speaks for itself and is as follows in brief:

The
TRIAL
of
JAMES THOMAS EARL OF CARDIGAN
before
THE RIGHT HONOURABLE THE HOUSE OF PEERS,
IN FULL PARLIAMENT,
for
FELONY,
On Tuesday the 16th day of February 1841.
Published by Order of the House of Peers.

Central Criminal Court to wit. } The jurors for our Lady the Queen, upon their oath,

present the Right Honourable James Thomas Brudenell Earl of Cardigan, late of the parish of Wandsworth in the county of Surrey, on the twelfth day of September in the fourth year of the reign of our sovereign Lady Vic-

toria, with force and arms, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the Central Criminal Court, with a certain pistol, then and there loaded with gunpowder and a leaden bullet, at and against one Harvey Garnett Phipps Tuckett, then and there being, then and there feloniously and unlawfully did shoot, with intent thereby, then and there feloniously, wilfully, and of his malice aforethought, the said Harvey Garnett Phipps Tuckett to kill and murder, against the form of the statute in that case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

A Resumé of the Opening Statement of the Crown Counsel:

"My lords, the substance of the evidence is this:—that upon the 12th day of September last the Earl of Cardigan fought a duel with pistols, on Wimbledon Common, with Captain Harvey Tuckett, and wounded him at the second exchange of shots. It will appear before your lordships, that at about five o'clock in the afternoon of that day two carriages were seen to come in opposite directions to the neighbourhood of Wimbledon Common, and a party alighted from each. It was evident to those who observed what was taking place that a duel was in contemplation. The parties came to a part of Wimbledon Common between the road that leads by Earl Spencer's park and a windmill standing upon the top of the common. The seconds first took possession of the ground, and made the usual preparations. The principals, the Earl of Cardigan and Captain Tuckett, were then placed at a distance of about twelve yards from each other; they exchanged shots without effect; they received from their seconds each another pistol; they again fired, and Captain Tuckett was wounded by Lord Cardigan. There came up, almost immediately, Mr. Dann,

who occupies the mill to which I have referred, and his son, with Sir James Anderson, a surgeon, who had been standing close by. The wound was examined; it bled copiously; but most fortunately, and I believe no one rejoices in that more than the Earl of Cardigan, it proved not to be of a dangerous nature. The parties were all removed by the miller, who was a constable, and took them into custody. The wound was further examined at his house, and Sir James Anderson pressed that he might be at liberty to take Captain Tuckett to his house in London, which was immediately acceded to, upon his promise to appear, when he had recovered, before the magistrates.

"The miller detained the Earl of Cardigan, and his second, Captain Douglas, in custody. Captain Douglas was the second of the Earl of Cardigan, and Captain Wainwright the second of Captain Tuckett. The Earl of Cardigan had still a pistol in his hand when the miller approached. There were two cases of pistols on the ground, one with the crest of the Earl of Cardigan upon it, which he claimed as being his property. The party were conducted before the magistrates at Wandsworth, and, upon alighting from his carriage, Lord Cardigan made use of these words, "I have fought a duel, and hit my man, I believe not seriously." He then, pointing to Captain Douglas, said, "This gentleman is also a prisoner, and my second." He was asked whether the person that he had hit was Captain Reynolds; upon which he said, "Do you think I would condescend to fight with one of my own officers?" His lordship was compelled by the magistrates to enter into a recognizance to appear when called for, which he did from time to time, till at last the matter was sent to the Central Criminal Court."

The evidence of the chief prosecuting witness for the

crown, that of Thomas Hunt Dann, was in substance as follows:

That the said Thomas Hunt Dann was a miller living at Wimbledon. His mill stood close to Wimbledon common. The miller himself was constable for the parish of Wimbledon. On the afternoon of Saturday the 12th of September, 18— about five o'clock thereof he observed two carriages driving toward the common, which stopped on the road adjoining thereto.

Two people alighted from each carriage and proceeded onto the common. One of these was Lord Cardigan, the prisoner at the bar. Upon observing this the miller proceeded directly inside of his house for his constable's staff, suspecting that a duel was about to take place. He then returned to the gate outside and ran toward two gentlemen about two hundred and twenty yards distant standing on the common about twelve yards apart presenting pistols toward each other's breasts. They fired once, the miller not only seeing but hearing distinctly the reports of two pistols. Fresh pistols were then brought and the firing repeated and the gentleman opposing Lord Cardigan was shot. By this time the miller had reached the scene and placed Lord Cardigan under arrest, taking from him his smoking pistol. The wounded gentleman was then taken to the house of the miller and from thence to the home of another. The wound proved not to be fatal. This together with other minor details constituted the substance of the miller's testimony. The cross-examination of Dann conducted on behalf of Lord Cardigan, the defendant, by Sir William Follett ensues herewith.

Q. "Will you give me those memorandums of yours?"

During a portion of witness' testimony he had refreshed his recollection with memoranda. Counsel instantly attacks the written documents.

Hereafter throughout this record the reader will be able to observe much of the principles outlined hereinbefore in this volume relative to the art and manner upon which a cross-examination should be conducted. The counsel for the defendant attacked either directly or indirectly the credibility of the witness, impugned his motives, tested his memory, questioned his ability to perceive that concerning which he had testified and left nothing undone in the manner of breaking down the influence such testimony might have had upon those who were to judge of it.

(The same were handed to Sir William Follett.)

Q. "When did you write these?"

A. "Every day as they occurred."

Q. "Beginning with September the 12th?"

A. "Yes."

Q. "Who desired you to do so?"

A. "On my own part, for my expenses."

Q. "Were you desired by any one to do it?"

A. "No, I was not."

Lord Winford. "Did you write them upon that paper at first, or upon some other paper?"

A. "I believe I copied them from another paper."

Sir William Follett. "When did you copy them?"

A. "Some time since; I can not say exactly."

Q. "What is the meaning of these sums; does this "20" mean 20s.?"

A. "No; it means miles."

Q. "So many miles that you went?"

A. "Yes."

Q. "You seem to have gone about a good deal upon this business; who ordered you to do it?"

A. "The magistrates."

Q. "What magistrates?"

A. "At Wandsworth."

Q. "What are their names?"

A. "Mr. Nottidge the chairman, Mr. Bainbridge, Mr. Wilson, and Captain Page."

Q. "Who gave you the order to go to the house in Hamilton Place?"

A. "The first order was from the policeman and from the inspector, and I understood that came from the magistrates."

Q. "Then you received no order from the magistrates to go there?"

A. "A note from the inspector first."

Q. "Did you go there more than once?"

A. "I went three times."

Q. "All by the same order?"

A. "No; once was by Captain Page's order, I think."

Q. "What had the magistrates to do with it; what had they to do with sending you about in this manner?"

A. "Their first object in sending me was to inquire as to the state of Captain Tuckett's health."

Q. "By whom were you sent to Mr. Wainwright, and to these various places; who ordered you to go; was it the magistrates?"

A. "Yes."

Q. "Were the magistrates taking up this prosecution, or what made them send you about?"

A. "I do not know."

An attempt to show that the prosecuting witness, Dann, was alone interested in and pushing this case.

Q. "Were they not the magistrates, the judges, before whom the complaint had been lodged originally?"

A. "Yes."

Q. "They were the persons that sent you to these different places to make inquiries and so on?"

A. "Yes."

Q. "Did they send you to the Old Bailey also?"

A. "I had a bond to take me there, and I was also informed by the inspector when I was to go."

Q. "You were examined as a witness before the grand jury?"

A. "Yes."

Q. "Were you also examined before the grand jury upon the bill against the other parties?"

A. "Yes."

Q. "The bill that was thrown out?"

A. "Yes."

Q. "The same witnesses were examined upon both, were they not?"

A. "Yes."

Q. "And you gave the same evidence upon both?"

A. "Yes."

Q. "One bill was thrown out, and the other found?"

A. "Yes."

Q. "Now will you have the goodness to go back to the statement you made first. You say you saw certain persons coming from the carriages?"

A. "Yes."

Q. "The persons you saw coming from the carriages, did you see them about the place where you afterwards saw the firing?"

A. "Yes."

Q. "The same Place."

A. "Yes."

Q. "You stated that when you saw them coming from the carriage to the place you then recognized one of them to be the noble lord who is now sitting there?"

A. "Yes."

Q. "What is the distance from your mill where you were standing to that place?"

A. "Two hundred and twenty yards."

Q. "Do you mean to state upon your oath before their lordships, that at the distance of two hundred and twenty yards, you were able to recognize any of the parties?"

A. "No; but then I did not lose sight of them."

Counsel attempted to show inability of witness to perceive or see at such a distance that concerning which he had already testified that he did perceive and see.

Q. "But your oath was, that at that time you knew him to be Lord Cardigan. Is that true or not?"

A. "No, I have never gone to say that; it is a mistake. I never intended to say that I knew him or any one else at that distance."

Q. "Could you know any of the parties, at the distance they were from our house, so as to be able to speak to them again."

A. "No."

Q. "Therefore, when you first saw the parties, you were not able to distinguish their features or their persons?"

A. "No."

Q. "Then you went to your gate afterwards, and you say, that when you saw the firing you were standing at your garden gate?"

A. "No, I was coming out at the gate."

Q. "That is about the same distance?"

A. "It is two hundred and twenty yards."

Q. "Then at the time the shot was fired, which you saw when coming out of your garden gate, could you have recognized at all the persons?"

A. "No."

Q. "You say you went towards them?"

A. "I did."

Q. "When were you first able at all to distinguish the persons?"

A. "I did not lose sight of them."

Q. "I am not asking whether you lost sight of them; I ask when you were first able to distinguish the persons?"

A. "The next time I saw them I recollected them again."

Q. "When, upon this occasion, were you first able to discover who the persons were, or to know them; was it after the second shot was fired?"

A. "After the second shot."

Q. "Then, at the time the second shot took place, you were not able to recognize or know who the persons were that were firing?"

A. "No; but after that I should know them again."

Q. "How could you know them again, if you were not able to see their persons at that time?"

A. "I did see them."

Q. "Did you see them so as to know them before the second shot was fired?"

A. "No, not before the second shot was fired."

Q. "Then when did you first see them so as to know the noble earl who is sitting there; what was he doing when you were able to see his person so as to recognize him?"

A. "He was standing at the very spot."

Q. "That was when you came up?"

A. "Yes."

Q. "Where were all the other gentlemen at that time?"

A. "Close by."

Q. "What were they doing?"

A. "I can not say what they were doing for a few minutes, because my attention was directed entirely to his lordship."

Q. "You do not know what the others were doing?"

A. "Not for a second or so. When I turned round I saw the other four standing."

Q. "Were you at all able to tell which of the other parties it was that fired the shot?"

A. "I am certain as to who was the party, because I never lost sight of them till I got up to them."

Q. "How does that make you certain as to who fired the shot?"

A. "I saw the pistol in his hand."

Q. "In whose hand?"

A. "In Captain Tuckett's hand."

Q. "He had a pistol in his hand when you came up?"

A. "He had."

Q. "You do not know what was done with it?"

A. "No."

Q. "How soon after that might you have seen the other gentleman that you said was a doctor?"

A. "When I turned round from Lord Cardigan, I then perceived that there were four."

Q. "How soon after that did you see another?"

A. "I did not see any more after the time when I turned from his lordship."

Q. "You mean four besides Lord Cardigan?"

A. "Yes."

Q. "When the fifth came up you do not know?"

A. "No."

Q. "Did you recognize his person so as to be able to know him again?"

A. "Yes.

Q. "And he went into your house also with the other parties?"

A. "Yes."

Q. "One question only as to these different places you have been to, and your charges; have you been paid for them?"

A. "I have not."

Q. "Did you go to the Home Office at any time?"

A. "I did."

Q. "At what time was it?"

A. "It was a week ago Saturday last."

Q. "What did you go there for?"

A. "I was requested to go there; and then I was asked questions as to my evidence."

Q. "At the Home Office?"

A. "Yes."

Q. "Who asked you questions as to your evidence at the Home Office?"

A. "A gentleman of the name of Vizard."

Q. "Was your examination taken down in writing at that time?"

A. "The gentleman was writing, but whether he was writing what I said, or what he was writing, I know not."

Q. "You had not been at the Home Office before?"

A. "No."

Q. "And that was the only examination that has been taken for the purpose of this trial?"

A. "I can not say."

Q. "But that is the only examination of you for the purpose of this trial?"

A. "Yes."

Q. "You had not been examined since the time you were at the Old Bailey till you went to the Home Office?"

A. "No."

Q. "Were there any other witnesses there?"

A. "Yes."

Q. "Who?"

A. "My wife and my son, and Mr. Busain and Mr. Bicknell."

Q. "All examined at the Home Office?"

A. "All went in before the gentleman, but what occurred with them I know not. I only answer for myself."

Q. "Have you presented this bill to any one for payment?"

A. "I applied to the magistrate for my expenses, and they gave me a certificate."

Q. "Have you received the money?"

A. "No."

Money again. If the defendant's attorney had succeeded he would have established the belief that Dann was the criminal instead of Lord Cardigan and that he was interested only in compensation for his services.

Q. "I understood you to say that you never lost sight of these gentlemen from the time you first saw them?"

A. "No, I have not said that. I did not lose sight of them after I came to the gate; prior to that I did lose sight of them."

Q. "Did not you tell me, when I asked you whether you had recognized them in coming from the carriages, that you had never lost sight of them?"

A. "If you understood me that way it was wrong."

Q. "You said so; but it was a mistake, was it?"

A. "Yes."

Q. "Then you did lose sight of them?"

A. "Yes, after I first saw them come on the ground."

Q. "For how long?"

A. "A few minutes."

Q. "Where were you at that time?"

A. "I was on the stage when I first saw them; the stage of the mill is about twenty feet high, and then I had to come down the stairs, and then I lost sight of them; and then I got into my house, and then I lost sight of them again."

Q. "How long were you in the house?"

A. "No more than just necessary to catch hold of the constable's staff, and then return."

Q. "Why did not you go towards the gentlemen at once if you suspected they were going to fight a duel?"

A. "I did not like to go without my authority."

Q. "You thought it better to let the duel be fought first, and then go and take them up?"

A. "No, I did not think that."

Q. "What was the meaning of your answer when you said you desired your wife to call you?"

A. "I left my wife to watch, and to let me know when there was sufficient that she could suppose it was a duel. I had suspicion it was a duel to take place."

Q. "As soon as she saw there was going to be a duel she was to let you know?"

A. "Yes."

Q. "And then you were to go two hundred and twenty yards for the purpose of preventing it?"

A. "Yes."

Q. "And when you got up you found that the gentlemen had exchanged two shots?"

A. "Yes."

Q. "Who had instructed you to stop duels upon Wimbledon Common?"

A. "I believe the first onset of it was in the case of Mirfin; the coroner recommended that I should be appointed."

Q. "Who was the coroner?"

A. "Mr. Carter."

Q. "And you got a constable's authority?"

A. "Yes."

Q. "And this is the first job you have made of it?"

A. "No; I have stopped several."

Q. "Have you been paid for them?"

A. "No."

Lord Wynford. "Why did not you call out to the gentlemen when you supposed that they were going to fight a duel?"

A. "I do not know my reason. I ran to them as fast as I could run."

Sir William Follett. "You changed your coat, did not you?"

A. "No."

Q. "You put on your coat, did not you?"

A. "No."

Q. "Did you stop the mill?"

A. "No."

The next witness called was Sebastian Byron Dann, the minor son of the miller. Herein is a good example of the handling of a child giving testimony. He was examined first by the Attorney General.

Sebastian Byron Dann sworn. Examined by Mr. Attorney General.

Q. "How old are you?"

A. "Fourteen last August."

Q. "Are you the son of Mr. Thomas Dann, the last witness?"

A. "Yes."

The direct examination continued at some length. The youth supported in the main his father's testimony with some slight variations.

Cross-examination by Mr. Serjeant Wrangham.

Q. "Have you ever been examined on this subject before?"

A. "Yes."

Q. "Before the magistrates?"

A. "No."

Q. "Before the Grand Jury?"

A. "Yes."

Q. "Who told you to go before the Grand Jury?"
A. "I had a subpoena."
Q. "Who gave you the subpoena?"
A. "Mr. Busain."
Q. "Had you been examined by anyone before you went before the grand jury?"
A. "No."
Q. "You had not told any one what you went to say?"
A. "No."
Q. "Have you since told it to any one?"
A. "No."
Q. "You have not told it to any once since?"
A. "I went to the Home Office."
Q. "Did you tell it to any one there?"
A. "Yes."
Q. "Did you go with your father?"
A. "Yes."
Q. "And you were examined by Mr. Visard, I suppose?"
A. "Yes."

The inference was left by Lord Cardigan's Counsel that all to which this child could possibly testify had been dictated to him by his father or others. Many of the principles of cross-examination are well illustrated by the several foregoing questions. They tend to inquire as to interest, the need of a subpoena, and to whom the lad has talked.

Q. "You say when you first saw these gentlemen you were at the door of the mill?"
A. "Yes."
Q. "Was your father there with you?"
A. "No."
Q. "Where was he?"
A. "I think he was up at the top."

Q. "Then you went upon the stage of the mill?"
A. "Yes."
Q. "Was your father there?"
A. "Yes."
Q. "You were first at the door of the mill?"
A. "Yes."
Q. "How far is it from the door of the mill to the place where you saw these gentlemen?"
A. "Two hundred and twenty yards."
Q. "About a hundred yards from the post chaises, you told the Attorney General?"
A. "No; about half a mile."
Q. "Did you not tell the Attorney General that the spot where these gentlemen were, when you first saw them, was a hundred yards from the post chaises?"
A. "Yes; then they walked about."
Q. "They were a hundred yards from the post chaises?"
A. "Yes."

The boy in saying two hundred and twenty yards stood pretty close to his father's story. The cross-examining counsel was determined to make him admit something to the contrary.

Q. "Were the post chaises together there?"
A. "No."
Q. "Then how came you to say that they were a hundred yards from the post chaises?"
A. "They were about a hundred yards from the post chaises when I first saw them."
Q. "The chaises were not together?"
A. "No."
Q. "How far were the chaises from each other?"
A. "About a quarter of a mile."
Q. "Now, I only want you to explain your answer; how you came to say that the parties were a hundred

yards from the post chaises, if one chaise was a quarter of a mile from the other?''

A. ''The parties were not together. There were two parties; two in each party. Then two of the gentlemen were about a hundred yards from one post chaise, and two from the other.''

Q. ''Then do you mean that two of the gentlemen whom you afterwards saw kneel down were a hundred yards from one of the chaises, and the other two gentlemen were a hundred yards from the other chaise?''

A. ''Yes.''

Q. ''And the two chaises were a quarter of a mile apart?''

A. ''Yes.''

Q. ''Then the two gentlemen whom you afterwards saw kneel down, I suppose I may take it that they were about a quarter of a mile from the other two gentlemen?''

A. ''One of each party knelt down. The gentlemen separated.''

Q. ''Did not you tell me just now that the two gentlemen that knelt down were a quarter of a mile from one of the chaises, and the other two gentlemen a quarter of a mile from the other chaise?''

A. ''I meant that the gentlemen separated, and two of them met.''

(A former question and answer were read to the witness as follows:)

> ''Q. 'Then do you mean that two of the gentlemen whom you afterwards saw kneel down were a hundred yards from one of the chaises, and the other two gentlemen were a hundred yards from the other chaise?''
>
> ''A. 'Yes.' ''

This trick was being imposed evidently for the pur-

pose of leading or misleading the child by confusing him to say something utterly inconsistent with any possibility of fact.

Q. "Do you repeat that answer, that the two gentlemen whom you afterwards saw kneel down were a hundred yards from one of the chaises, and the other two gentlemen a hundred yards from the other chaise?"

A. "No."

Q. "Having had the previous question and answer read to you, will you explain what you mean?"

A. "I mean that when I first saw the gentlemen they were about a hundred yards off from the post chaise, and then both the parties separated, and two of them came and met, and then walked about a little while together, and kneeled down."

Lord Rossie. "They did not kneel down when you first saw them?"

A. "No."

Mr. Serjeant Wrangham, "When you first saw them, were they standing two in one couple, and two in another, or all four together?"

A. "Two in one couple, and two in another."

Q. "Were one of those couples the two gentlemen who afterwards knelt down, and the other couple the two gentlemen who did not kneel down?"

A. "They were not together,—the two gentlemen that did not kneel down."

Q. "At this time that you are speaking of, when the gentlemen knelt down, how far were they from you?"

A. "They were about two hundred and twenty yards."

Q. "Could you distinguish who the persons were that knelt down?"

A. "No."

Q. "Could you distinguish who the parties were who did not kneel down?"

A. "No; not at that time."

Q. "Could you at that time have told us whether Lord Cardigan was one of the parties that knelt down or not?"

A. "No, he was not."

Q. "How is it that you can take upon yourself to say that he was not one of the parties that knelt down, if you could not distinguish who the parties were?"

A. "I saw who they were. The Earl of Cardigan was not with them when they were kneeling down."

Q. "Do you mean to say that you could at that distance distinguish the parties who knelt down?"

A. "I could see who they were."

Q. "That is distinguishing them, is it not?"

A. "Yes, from the other two."

Counsel was trying to make witness admit that which he did not say. However the youngster took care of himself in good order.

Q. "Then you tell their lordships now that you could distinguish them at two hundred and twenty yards distance?"

A. "I could distinguish them from the other two."

Q. "That is to say you could distinguish them from the other parties who were present?"

A. "Yes."

Q. "How long did you remain upon the stage of the mill?"

A. "Not a minute hardly."

Q. "Were you there when the firing took place?"

A. "No."

Q. "Where were you then?"

A. "When the last firing took place I was half way

from the gate to the place. I was upon the stage at the first firing, and then I ran down directly."

Q. "Was your father on the stage with you?"

A. "No."

Q. "How came you to stay there?"

A. "I had only got up there just before they fired; about a minute or a little more than a minute before they fired."

Q. "Was your father there when you got up?"

A. "No."

Q. "Did you see where your father was at that time when you first got on the stage?"

A. "He was at the gate then."

Q. "Did you see him there?"

A. "No, I could not see him, but he said he was at the gate."

Q. "Could you see where your father was?"

A. "No."

Q. "But you are sure that he was not on the stage?"

A. "Yes."

Q. "And then you remained there a minute?"

A. "Not after the firing."

Q. "From the time you first went up?"

A. "Yes."

Q. "You remained there until after the first shot was fired?"

A. "Yes."

Q. "Was it one or two shots that you heard?"

A. "There were two shots."

Q. "But at the first firing you heard one report?"

A. "Yes."

Q. "And the same thing when the second firing took place?"

A. "Yes."

Q. "That is so?"

A. "Yes."

Q. "Did you follow your father to the ground?"

A. "Yes; he was there when I was about half-way."

Q. "Then you saw one of the gentlemen wounded afterwards?"

A. "Yes."

Q. "Where did you see him?"

A. "He was on the ground then."

Q. "He was on the ground when you saw the blood that you speak of?"

A. "Yes."

Lord Wyneford. "Do you mean lying on the ground, or standing on the ground?"

A. "Standing on the ground."

Mr. Serjeant Wrangham. "Did you see him after he was taken to the mill?"

A. "Yes; I saw him get into the carriage."

Q. "That is the last you saw of him?"

A. "Yes."

Q. "You have never seen that gentlemen since?"

A. "No."

Q. "Nor before?"

A. "Only when I saw him on the common."

Q. "All that you know of him is, that you saw a gentleman wounded there whom you did not know, and whom you have never seen again?"

A. "Yes."

Q. "Then, when you speak in your evidence about Captain Tuckett, you mean to speak of this gentleman who was wounded?"

A. "Yes; my father told me it was Captain Tuckett."

Q. "You have been told by your father, but of yourself you know nothing, except that a gentleman came there and was wounded whom you did not know and have never seen since?"

A. "No."

At last! Finally this persistent cross-examiner got an answer to a double-barrelled question from which he might later argue that the child admitted his father told him everything to say.

Succeeding the evidence in this case came the arguments of counsel and at their termination after deliberation it was moved that the House proceed to give their opinion whether the said Earl was guilty or not guilty of the charge in the indictment; which case being put, passed in the affirmative.

Strangers were again admitted.

When, after proclamation made for silence, the Lord High Steward, standing up, by a list called every peer by his name beginning with the first baron, and asked him, "Lord John Keane how says your Lordship; is James Thomas Earl of Cardigan guilty of the felony whereof he stands indicted or not guilty?"

Whereof Lord John Keane, standing up in his place uncovered, and laying his right hand upon his breast answered, "Not guilty upon my honour."

In like manner, the several Lords, being all that were present, so answered.

Then the Lord High Steward declared that the Earl of Cardigan is acquitted of the felony whereof he stands indicted, all the Lords present having unanimously voted him "Not guilty."

Proclamation was made for bringing the prisoner to the bar.

The Earl of Cardigan was brought to the bar by the yoeman usher.

Wherefore the Lord High Steward did then there inform him of his acquittal and that it was had by the unanimous vote of the Lords.

His Lordship retired.

Proclamation was made for dissolving the commission and the white staff being delivered to the Lord High Steward by the gentleman usher of the Block Rod, his Grace stood up uncovered, and holding the staff in both his hands broke it in two and declared the commission to be dissolved.

CHAPTER 23

THE HINSHAW MURDER CASE

On the 10th of January, 1895, the little village of Bellville, in Hendricks County, Indiana, was startled out of its peaceful slumbers by the loud report of two pistol shots. Cries of "Help" were heard and the startled neighbors were directed by the sound of the agonized voice to the home of Rev. W. E. Hinshaw. They found him out on the road clad in his undergarments and bleeding from seventeen knife wounds and two pistol wounds. He was barefooted and his tracks could plainly be seen in the snow in the flickering lantern lights. The snow had fallen earlier in the night. He gave an account that two burglars had entered his house while he and his wife were sleeping soundly side by side; that he heard two shots fired, one of which struck him in fleshy part of his breast; that he and his wife jumped out of bed and fought the two burglars out of the bedroom through the adjoining parlor and out through the dining-room and through the kitchen; that he then continued to fight one of the burglars clear across the street near to a neighbor's house and that the burglar cut him a number of times during this part of the fight; that the burglars both ran south along the side road where the wounded man was found and he pointed out the direction in which they went.

In the meantime, while the bleeding man was telling this story to some of the neighbors, the body of the wife was found by others, lying on the little porch at the back of the house, with her face upturned to the lightly falling snow. Two doctors were present upon examina-

tion. A bullet wound was found upon the head of the woman, entering just over the ear on the right side and coming out at the temple on the left.

Immediate search began for the fleeing burglars, but no one saw them and no one found their tracks in the snow. The whole village was in an uproar. The Rev. Hinshaw was a very popular minister of the gospel and his story was received with almost universal confidence. Upon his breast were superficial knife cuts. The injury from the bullet was of a like nature, it having been fired so close to his shirt as to leave powder burns.

While he was recovering, he was visited by many and he told the burglar story over and over again, but always with contradictory details. Some of the less excited neighbors began to compare these stories and doubt arose as to their verity. At length, the attention of the grand jury was called to the affair. Rumors which afterwards turned out to be well founded, were floating about to the effect that the Rev. Hinshaw had been leading a double life and that there was another woman in the case. During the examination before the grand jury, Hinshaw made himself very conspicuous, even attempting to intimidate some of the witnesses. After a long and stormy session, the grand jury returned a bill for murder in the first degree against the minister for the murder of his wife, Thurza Hinshaw.

The judge of the Circuit Court of Hendricks County, Indiana, appointed Henry M. Spaan to assist the regular prosecutor, Otis Gulley, in the trial of the case. The defense was led by John S. Duncan, one of the ablest lawyers of the Middle West. It took a full month for the trial as the state had to rely for conviction entirely upon circumstantial evidence and the various statements made to different witnesses by the defendant. The jury was out only one hour and brought in a verdict of murder in

the first degree. Hinshaw served twenty-five years in prison and was then finally paroled. This is fully reported in volume forty-seven of the Supreme Court reports of Indiana and has become a ruling case on circumstantial evidence, its force and limitation.

Many thrilling instances arose in the trial, some of them very amusing. The state had introduced a green country boy to show by him that one night he saw a woman, naming her, come out of Hinshaw's house and go down the road to her own home. This was about a month prior to the murder.

Mr. Duncan on cross-examination, said:

Q. "Mr. Witness, what time of the night was this?"

A. "About two o'clock in the morning."

Q. "What were you doing at the house?"

A. "I was calling on my girl."

Q. "What! at two o'clock in the morning?"

A. "Oh, yes, Mr. Duncan it's all right. I married the girl and we are still married." (The jury smiled.)

Q. "Did your girl see this woman too?"

A. "Oh, yes, and she said 'that preacher will get caught some day'."

The latter part of the answer was stricken out, but it was a body blow to the defense. Questions asked by the best of lawyers sometimes lead to disaster. No one but a lawyer in full practice can appreciate the harm that can come from a chance answer made to a competent and pertinent question.

A charming old lady was placed upon the witness stand by the defense to show that on the night of the murder, she had heard the sound of running feet go past her home which was situated on the road the burglars took according to the statements of the defendant, made when he was found wounded by the neighbors. This would have been strong evidence for the defense.

On cross-examination, Henry M. Spaan, of Indianapolis, Indiana, proceeded as follows:

Q. "Your hearing is very good is it not?"

A. "Yes, sir." (This answer came promptly.)

Q. "I will not ask you for your age. You seem to be a very bright lady."

A. "Well, I usually know what I am talking about." (This with a self-satisfied air that made friends of the jury.)

Q. "The house you live in stands alone with vacant places all around it, does it not?"

A. "Yes, sir." (This with an amused smile.)

Q. "There were loose horses running about in those vacant places were there not, about the time Mrs. Hinshaw was shot?"

A. "Yes, sir, I saw them the evening before; they came, two of them close to our house. I drove them away."

Q. "When you heard those running feet on the night Mrs. Hinshaw was shot, you did not see any horses nor any men running?"

A. "Oh, no, I was in bed."

Q. "Now then it may have been the horses you heard the night of the murder, running past your house?"

A. "Oh, yes, sir, it might have been."

Q. "You did not hear the voices of men did you?"

A. "No, sir. Just some running."

Q. "When did you learn that Mrs. Hinshaw had been shot?"

A. "Not till next morning."

As she left the stand, she gave a fine bow to the court and jury at which everyone smiled except attorneys for the defense.

In giving an account of the attack by the burglars, Mr. Hinshaw had stated that shortly after one o'clock at

night, he was aroused by a pistol shot and that immediately, his wife, who was in the same bed with him, uttered a cry of distress saying: "Oh, I am shot, did you shoot me Will?"; that he jumped out of bed and began struggling with the burglar; that his wife began to struggle with a second burglar; that during the struggle, his wife came to him, put her arms about his neck and said "Will, is this you?"

The autopsy showed that the bullet which went through the head of Mrs. Hinshaw was thirty-eight in caliber and that its course was direct and that the brain tissue was badly torn. It also showed that the brain center in which speech is located was completely shattered.

The theory of the prosecution was that Mrs. Hinshaw, after she received this wound, was utterly incapable of speech or movement. Five noted medical experts testified that this theory was true.

The defense placed two experts on the stand who stated that in their opinion, she was capable of both speech and movement.

The first of them was a practicing physician of many years standing in the city of Indianapolis.

He was cross-examined by Mr. Spaan as follows:

Q. "Doctor, in the forty years of your practice, did you ever treat or see treated a human being wounded as Mrs. Hinshaw was?"

A. "I have seen treated and I have treated quite a number of brain injuries."

Q. "My question is doctor, wounded as Mrs. Hinshaw was."

A. "No, I never did."

Q. "Did you ever read in medical history of exactly such a case, that is with the speech center of the brain entirely torn away?"

A. "No, I never did."

Q. "Do you believe that a woman with her speech center shattered by a thirty-eight caliber bullet could have arisen out of bed, engaged in a desperate fight with the burglar, and during the fight could have gone to her husband who was fighting with a second burglar, put her arm about the husband's neck and say 'Is this you, Will'?"

A. "I don't know, it might be possible."

Q. "It would have been a miracle, would it not?"

A. "Yes, it looks like it."

Q. "But the days of miracles have passed, even in Indiana, have they not?"

A. "I guess they have."

The next witness on this subject was a noted brain expert from Richmond, Indiana, who testified that in his opinion, it was possible for a person wounded as Mrs. Hinshaw was to both speak and move about after receiving such a wound.

This was the cross-examination in substance:

Q. "Doctor how much pay do you receive for testifying in this case?"

A. "What has that got to do with the case?"

Q. "We want the jury to know how much your opinion will cost the defense, that is all there is to the question. Please answer."

A. "About five hundred dollars."

Q. "Before you took the witness stand, did you go over your testimony carefully with the attorneys for the defense?"

A. "Yes, I did."

Q. "More than once?"

A. "Yes. Several times."

Q. "You are a professional expert in cases of this kind are you not?"

A. "Just what do you mean by that?"

Q. "I mean that you take employment as an expert in insanity cases and other cases of brain injury where such cases come up in court and that you do so for a high consideration?"

A. "I have been such an expert in cases."

Q. "Always for money, is it not so?"

A. "Well, — yes."

Q. "In how many cases have you testified as such an expert?"

A. "Quite a number."

Q. "Over a hundred?"

A. "I have not kept a strict account, but I will say yes."

Q. "You also insist in this class of cases that your fee be fixed beforehand and that it be paid?"

A. "Yes, certainly."

Q. "Well then, with a fee of five hundred dollars assured you in this case do you consider yourself a disinterested witness?"

A. "Why yes, I testify to what is my opinion. I have no interest in the case otherwise."

Q. "Now, let me ask you this question. In all of these cases in which you were employed to testify as an expert, you always testified in effect to what your employers expected you to testify?"

A. "Just what do you mean by that?"

Q. "I mean your testimony in chief in no case has disappointed the persons who employed you?"

A. "I think not—I always gave my opinion after learning the full facts."

Q. "Well, all you know about this case was what the lawyers told you in your various consultations was it not?"

A. "Yes, that is true."

Q. "So that you and the lawyers agreed perfectly about your testimony before you went on the witness stand?"

A. "Yes, sir."

Q. "Doctor, have you ever, in your own practice, been called upon to treat a wound just like the wound in Mrs. Hinshaw's brain—I mean a wound which tore away the speech center of the brain?"

A. "No, I never did."

Q. "Is not the real reason this—that persons so wounded die almost instantly and a doctor is useless?"

A. "Well, such wounds are usually fatal."

Q. "Did you ever know of a case that was not?"

A. "No."

Q. "Did you read of one in your medical studies?"

A. "Yes, one—the Crow Bar Case."

Q. "You mean the case when a crow bar entered a man's head from below and the end came out at the top of his head?"

A. "Yes."

Q. "In that case, the speech center of the brain was not impaired, only the extreme front of the brain, is that not so."

A. "Yes, that is as I remember it."

Q. "Can you give us any other case that you read about?"

A. "No, not just now."

Q. "Then, doctor, you have neither in your practice nor in your reading ever seen or heard of just such a case as Thurza Hinshaw's?"

A. "Not exactly, no."

Q. "Then why do you say that Thurza Hinshaw could both fight with a burglar and speak to her husband after her speech center had been shot away?"

A. "That is merely my opinion. It might have been done."

Q. "And for that opinion, you have received or will receive the sum of five hundred dollars?"

A. "Yes, if you want to put it that way."

CHAPTER 24

THE HYDE MURDER CASE

The trial and conviction of Dr. B. Clarke Hyde for the murder of one Col. Thomas H. Swope, aged eighty-two, in the Criminal Court of Kansas City, Missouri, during April and May, 1910, exposed a series of horrible events unparalleled in the annals of American criminology. The instrumentalities employed in the commission of the offense charged, the heartlessness of its author, and the persistency with which he employed his heinous arts have never been equalled save by the deeds of a maniac.

While the respondent in this case was convicted and sentenced to life imprisonment for the murder of Col. Swope alone, the evidence exposed facts which indicated his responsibility for the death of Chrisman Swope, the Colonel's nephew, Col. James Moss Hunton, aged sixty, his cousin, and the attempted killing of eight others.

The victim in this case at the time of his death was possessed of a fortune of approximately three and one-half million dollars. Mrs. Logan O. Swope, with whom he resided at Independence, was his brother's widow and the mother of seven children, two sons and five daughters. The sons were Chrisman, and Thomas H., and the daughters Frances, Lucy Lee, Margaret, Stella and Sarah. The two latter only were minors. Frances, the eldest was the wife of the defendant.

James Moss Hunton had for many years been a member of the Swope household at Independence. He was a director in the Independence bank, was Mrs. Swope's business manager, and one of the legatees and executors

in the Colonel Swope's will. Dr. Hyde and his wife resided in Kansas City, Missouri, one hour's ride by trolley from Independence.

During a period of three months, beginning in October, 1909, a remarkable series of apparently inexplicable misfortunes descended upon the Swope household. These were in brief as follows: October first, Moss Hunton was stricken with apoplexy and under the medical treatment of Dr. Hyde died in an hour. He first had an attack of illness at the dinner table. Dr. Twyman, the family physician, was called and also Dr. Hyde. The latter declared that Colonel Hunton was suffering from apoplexy and that blood-letting was necessary. This was done, and over the objection of the other physician present, far too much blood was drained from the patient's body. Later respondent gave him a fever capsule. He died that night.

October third, Colonel Swope was given a "digestive" tablet at defendant's direction, and in a few minutes was seized with convulsions which were followed by death the same evening. In the ensuing November and December typhoid fever made its appearance in the family. Within a period of about thirty days, ten persons living within the premises were stricken, excepting only Mrs. Swope, Dr. Hyde and his wife. On December fifth, Chrisman, who was by that time suffering severely from typhoid, was given a "fever" capsule by the defendant. Convulsions followed in a few minutes; unconsciousness succeeded; then a state of coma. On the next day he recovered slightly whereupon defendant gave him another tablet which resulted in convulsions and death. While the nurses and family were at supper on December twelfth Dr. Hyde came into the room of Miss Margaret Swope, who was likewise ill with typhoid, and injected into her arm a fluid from a hypodermic needle. He was

not the physician in charge and did this without explanation or request. Because of this injection she suffered intense pain, her arm swelling to double its normal size. This lasted for months.

Lucy Lee Swope had left Independence for Paris, France, on the September twenty-sixth preceding these calamitous occurrences to take up her musical studies. Hence she was not at home when Moss Hunton or Colonel Swope died. On December sixth, when it appeared that the cloud of misfortune was again settling upon the family, her mother notified Miss Lucy Lee to return at once. The latter replied by cable that she would arrive in New York on December fifteenth. On the way home from the cemetery on December eighth, the date of Chrisman Swope's funeral, Mrs. Swope, Dr. and Mrs. Hyde and Thomas Swope, rode together in the carriage. They conversed regarding who should meet Lucy Lee upon her arrival in New York. Dr. Hyde volunteered. Mrs. Swope objected, insisting that some woman go. This defendant opposed upon the ground it would be unsafe. Dr. Hyde's opinion prevailed. He left Independence on the morning of December thirteenth, arriving in New York on Wednesday of that week and meeting Lucy Lee. They started home on a sleeper that evening. A few minutes after the train moved the young woman complained of thirst. Respondent produced a folding cup and filled it with water from the tank, which she drank. That was December fifteenth. They arrived at Independence the morning of the seventeenth.

After Lucy Lee reached home she stayed with friends and had no occasion to drink any water in the Swope home. One week from the day she took the cup of water given her by Dr. Hyde she developed a perfect case of typhoid fever. The incubation period of typhoid germs is from seven to fourteen days.

Margaret Swope was still suffering from typhoid. On Saturday, December eighteenth, she seemed much better. This was the morning following Lucy Lee's arrival from New York. Her temperature and pulse were normal and she appeared on the road to speedy recovery. Dr. Hyde came into her room about seven o'clock and caused the nurse in charge to give her a capsule from a box carried on his person. When Margaret took the capsule she was in fine spirits, laughing and talking. Within twenty minutes thereafter she was in convulsions, her condition being similar to that suffered by Chrisman when he died. The sputum from her mouth was caught in a basin and preserved in a sterilized bottle. It was later analyzed by toxicologists and strychnine was found therein.

Following these events suspicions were naturally directed toward Dr. Hyde. Margaret, who did not die, was closely guarded day and night until she had completely recovered. An official inquiry resulted, followed by an indictment.

It was brought out in the evidence of the trial that shortly prior to the death of Colonel Swope defendant had from time to time secured cultures containing typhoid germs and more than two hundred test tubes.

Too, on the evening of Hunton's death, defendant upon leaving the Swope home for consultation with Dr. Twyman, dropped something out of his hand and then stepped on it. Young Tom Swope after his departure looked to see what was dropped and found about a half of a broken capsule. He retained this and later upon examination it was found to contain cyanide of potassium. An autopsy upon the body of Col. Swope made later by Doctors Haynes and Vaughn of Chicago showed the presence of cyanide of potassium there and enough strychnine to kill a human being.

It was brought out in the evidence at the trial that shortly prior to the death of Col. Swope, Dr. Hyde had made his first purchase of cyanide of potassium and his second purchase just prior to the demise of Chrisman. His explanation was that the first purchase of cyanide of potassium was bought to remove nitrate of silver stains from his fingers and the second to kill insects, and then a third because he "supposed that it had occurred to him that he had needed it for one or both of the reasons already given."

The motive for the alleged crime was shown in the fact that respondent's wife would profit greatly by the elimination of her various brothers and sisters, and that Col. Swope had announced his intentions to change his will which would, by reason of certain charitable bequests, deprive Mrs. Hyde of approximately one hundred thousand dollars.

Various medical experts who took the stand on behalf of the respondent testified that the symptoms observed in Colonel Swope, which the state contended came from the administration of poison, could have resulted from disease. It is the cross-examination of these experts and of respondent himself that will constitute the chief interest to the legal profession.

The State's case was presented by Virgil Conkling, prosecuting attorney of Jackson County, assisted by United States Senator James A. Reed who appeared as special counsel. This included a complete recital of the facts just given with a volume of circumstantial evidence to support the charge. The respondent took the stand in his own behalf, waiving thereby his constitutional protection, and was required to answer all interrogations applied to him. He was a very able man with unusual mental powers and possessed of an excellent stage presence. Only an array of damaging circumstances against

him made a satisfactory explanation of these accusations impossible.

It was on November first that the respondent told E. L. Stewart, a bacteriologist of Kansas City, that he, Dr. Hyde, was interested in bacteriology and would like to do a little work in that field. On November tenth, Dr. Hyde came to Dr. Stewart and secured six culture containers, one of which held typhoid germs, and an apparently wholly unnecessary number of glass tubes used for holding bacteria. Respondent testified that he used only from eight to twenty of these. The total number of test tubes he acquired in the space of a few weeks was two hundred and eleven, and this just prior to the outbreak of the typhoid epidemic in the Swope home.

Strange to say directly following the first two deaths in the Swope home, respondent was elected president of the Medical Association of Jackson County, Missouri, in which Kansas City is located.

The cross-examination of Dr. B. Clarke Hyde, respondent, by Virgil Conkling, State attorney:

Q. "Who did you talk to about getting the germ cultures?"

A. "I talked to Doctor Stewart."

Q. "Where was it you got these germ cultures from Doctor Stewart?"

A. "They were obtained at his office."

Q. "When?"

A. "I have no way of placing that date definitely. It didn't attach itself to my memory with any certain or special interest."

Q. "Does the tenth day of November appeal to you as being about the correct date?"

This was just before the typhoid epidemic broke out in the Swope household and the State's attorney was at-

tempting here to secure an admission of same from the respondent.

A. "It might have been. I don't say that it is not."

Q. "How many culture germs did you get?"

A. "I got five."

Q. "What were they—was one of them diphtheria?"

A. "Yes, sir."

Q. "Was one typhoid?"

A. "Yes, sir."

Q. "Where did you take them?"

A. "I took them to my office."

Q. "In the Keith and Perry building, I believe you said?"

A. "Yes, sir."

Q. "What did you take them for?"

A. "I took them there so I could study on the mortality of the germs and the form and shape and the way they grow, and also to use particularly typhoid in a common experiment or a common examination for the Widal test."

Q. "You say you used a great part of that typhoid culture?"

A. "I don't know how much I used."

Q. "You used it more extensively than the other, did you?"

A. "I believe I did."

Q. "Did you use about half of it, Doctor?"

A. "I don't remember."

Q. "Did you transplant any of the germs in other cultures?"

A. "I think I did."

Q. "How many?"

A. "I don't remember."

Q. "About how many?"

A. "About how many—I think more than eight or ten and less than two dozen."

Q. "Somewhere about fifteen would be about right, fifteen or twenty?"

A. "I don't know just what the number would be."

Q. "And would fifteen be about right?"

A. "I couldn't say; I tried to tell you."

Q. "Well, make an allowance?"

A. "It might have been as few as eight."

Q. "It might have been as few as eight?"

A. "Yes, sir."

Q. "Was it as many as sixteen?"

A. "I couldn't say."

Q. "What makes you think it might have been as few as eight?"

A. "I transplanted some germs, and after giving them the proper time to grow, I saw there was a contamination in the method I used and the culture would not be a pure culture because the contamination is very easily obtained; even on exposure to air the culture might obtain other bacteria and destroy it. I think I deposited them in the tin container there in the office."

Q. "How many was there of that first batch that was spoiled?"

A. "I don't know."

Q. "About how many?"

A. "As few as eight, and as many as two dozen, along in there."

Q. "That was all?"

A. "Yes, sir."

The purpose of these questions was to limit the respondent as much as possible to the number of tubes actually utilized by him as a contrast to the larger number he had obtained. The jury naturally looked for some probable reason for his continued possession of the

others or if they were used, in what way; and then in response to further questioning relative to the whereabouts of the remainder of the cultures and test tubes he replied:

A. "When I found out that my place had been robbed I noticed that some of them were taken out, and just how many I don't know. So I don't know how many there are now."

Here came the explanation; namely, that his office had been robbed and tubes taken therefrom; consequently not utilized by him in the manner asserted by the State. Following this the State's attorney attempted through the respondent to identify one of the tubes and to inquire generally into his purpose for having it.

Q. "Is this it, Doctor?" (Counsel shows witness a glass tube.)

A. "Will you let me take it in my hand?" (Counsel hands tube to witness.)

Q. "Is that the typhoid culture that you got from Doctor Stewart?"

A. "All these are identical; you couldn't tell one from another."

Q. "See if that has been disturbed, if any typhoid has been taken off?"

A. "I see on that gelatine there is a mouldy growth; I don't know whether that is typhoid or not, or when it was taken off or how much was taken at a time; these tubes are identical."

Q. "They look very much alike, I understand that; look and see if that is labeled typhoid germs?"

A. "It is labeled typhoid baccilli."

Q. "Was the one that you got from Doctor Stewart labeled that way?"

A. "I think it was."

Q. "Does this look like the one you got from Doctor Stewart?"

A. "These tubes are all identical."

Q. "Is this label like the one you got from Doctor Stewart?"

A. "I don't remember exactly the label. This is Parke-Davis & Company, these labels are all the same. There is a certain number given in red here; I suppose that is the house mark."

Q. "When did you make the Widal test with it?"

A. "I cannot give you the definite date."

Q. "Upon whom?"

A. "I can remember one patient."

Q. "Whom?"

A. "Mr. Brent."

Q. "Can you remember any others?"

A. "No, sir, I can not."

Q. "Did I understand you, Doctor, that you can name but one person that you made any Widal test upon?"

A. "I think your understanding is correct."

Q. "Purely for research?"

A. "No research, purely a matter of examination."

Q. "Well, where did you make the Widal test of Mr. Brent?"

A. "Where? There in the office."

Q. "There has been enough typhoid germs taken off of this culture to make a hundred Widal tests, has there not?"

A. "I don't know."

Q. "Does it look like it?"

A. "I couldn't say that."

Q. "Could not two hundred Widal tests be made from one of these cultures if it was a healthy growth of typhoid germs?"

A. "I don't know."

Q. "About two hundred?"

A. "I couldn't say."

Q. "Could you not have made one hundred with the half that you removed there?"

A. "Yes, sir; and you might have made one if you scraped it all off on the platinum loop at one time; there would have been enough for one."

Q. "For one what?"

A. "Widal test."

Q. "If you had taken all of this tube?"

A. "Yes, sir."

Q. "Then, as I understand you, a whole tube is only sufficient for one Widal test?"

A. "It may be."

Q. "Don't you know that five hundred Widal tests may be made from a healthy typhoid culture?"

A. "I don't know."

Q. "Then why do you say that only one can be made?"

A. "Because all can be scraped off and used in one test."

All of which went to show that a falsehood is ever inconsistent with the truth. Respondent was not thoroughly grounded relative to the Widal test though he handled himself fairly well. The questions then turned to his trip in New York to meet Miss Lucy Lee Swope.

Q. "Upon the fifteenth of December you were in New York, were you not?"

A. "The fifteenth, I was either going or coming."

Q. "And you started on the thirteenth?"

A. "And got into New York—"

Q. "On the evening of the fourteenth?"

A. "On the evening of the fourteenth, yes, sir."

Q. "You were in New York on the fifteenth of December?"

A. "Yes, sir; I think I was."

Q. "Then on the fifteenth of December you did not have this germ with you in New York?"

A. "I had no germ."

Q. "You had left this at your office here?"

A. "I had no culture tubes with me; I might have."

Q. "You had left this culture tube that you borrowed from Doctor Stewart in your office?"

A. "I didn't borrow any culture tube from him."

Q. "The one he had furnished you?"

A. "The one I had taken to him and had some growths put on it, I had left at the office."

Q. "And when you left the office there was only one of them disturbed?"

A. "There were none disturbed at that time."

Q. "Did you make the Widal test at that time?"

A. "The fifteenth? December fifteenth; yes, sir."

Q. "You must have had other patients during November and December?"

A. "Yes, sir."

Q. "You got them to use on patients?"

A. "Use on patients. I don't think you are using the right term."

Q. "I am speaking respectfully of course. I mean to use on patients?"

A. "Not with any particularity."

Q. "Mr. Brent is the only patient whose name you can give to this jury that you used them for?"

A. "I can state definitely that I took a couple from his system and used them, and there were others, but I don't know just whose they were now."

Q. "How many others?"

A. "I don't know."

Q. "About?"

A. "There were several."

Q. "Can you give the names of any of them?"

A. "No, sir."

Counsel now turned his attention to the first of November again with interrogations that would confuse or seriously embarrass the ordinary individual. The Doctor, however, had a reply of some sort for each one.

Q. "Did you buy forty-four culture tubes on November eleventh?"

A. "I don't remember the date on which I gave the order and these materials came at different times. They were not ordered all at once, I remember that."

Q. "You only ordered them for those experiments?"

A. "I ordered them to be used whenever needed or desired in my laboratory."

Q. "Was the forty-four sufficient for your purpose?"

A. "If it had have been I would not have ordered more?"

Q. "You did order more, did you?"

A. "I think there were several dozen more than forty-four."

Q. "You think there were several dozen more than forty-four?"

A. "I don't remember just the number but I think there was more than forty-four by several dozen."

Q. "Have you not stated you used only eight to twenty?"

A. "Yes, sir."

Q. "Was the forty-four enough for that purpose?"

A. "For the immediate purpose."

Q. "How many did you need for the ultimate purpose?"

A. "I could not tell when I started how many I would need in the next two or three years."

Q. "Were you going to stock up for the next two or three years?"

A. "Yes, sir; for an indefinite period of time."

Q. "You were intending to go into it in a wholesale way?"

A. "I had no such intention."

Q. "Then why were you buying enough culture tubes for two or three years?"

A. "Because they could be used as I liked, like I would buy several dozen handkerchiefs at one time, not having to use all of them the same day or the same week."

The respondent forgot himself. He should have known that cultures deteriorate and can not be long preserved for experimental purposes. Too, this fact had previously been brought out by the State's experts on the witness stand.

In this cross-examination the evidence relating to each portion in the alleged crime was taken step by step. At length counsel turned to that pertaining to the cyanide of potassium. It was on Saturday, December fourth, that Dr. Hyde made one of his purchases of poison-potassium cyanide, from Brecklein's Drug Store in Kansas City. He told the druggist that he wanted this poison for killing dogs. On Sunday, December fifth, due to some slight variation in the arrangement of nurses, only one was on duty. About three P. M. she returned to Chrisman Swope's room and she there found Dr. Hyde alone with the patient. It was then about time to give Chrisman his medicine, an antiseptic capsule, and Dr. Hyde told her that he had given this to him. Respondent then directed her to give Chrisman a sponge bath. She did so, consuming about twenty minutes.

At this juncture, Chrisman was seized with a convulsion. He became perfectly rigid; his eyes were set, his head drawn back, he was quivering all over, a sort of a humming sound coming from his lips; his arms and

hands were up; his legs were straight out and rigid. He was pulseless. This convulsion lasted about fifteen minutes and was followed by a state of coma. Chrisman lay unconscious, his pupils widely dilated, his face colored with a slightly bluish tinge; his eyes were set, staring and wide open; his arms were flexed, hands clenched and muscles spastic. Dr. Hyde was not present when the seizure took place but came in later and asked "What happened to Chrisman?" The nurse said she did not know and said to the doctor, "Doctor, it looks like meningitis." Dr. Hyde said, "That is what it is."

Dr. Twyman and his son, Elmer D. Twyman, a thoroughly grounded young physician, were called and gave various tests for meningitis, none of which disclosed the presence of this ailment. During the afternoon Chrisman was partly conscious and delirious. Dr. Hyde returned about four o'clock, examined the patient and then left the room. He came back and told the nurse, "The patient looks as though he is getting along all right and it is time for him to take his medicine." He walked over, got a capsule, gave it to her and told her to give it to the patient, which she did. Half an hour later the patient became so restless they had to hold him in bed. He was weak, unconscious, and his eyes were set again. Dr. Hyde told her he had another convulsion. His head was drawn, his eyes were set, his arms and legs rigid. He died within an hour.

Q. "Is it a usual thing or not for a doctor to be called to a drug store to get medicine in person, when he has sent for it?"

A. "When he has sent for it, and then subsequently be called?"

Q. "Yes."

A. "I should consider that unusual."

Q. "You should consider that unusual?"

A. "Yes, sir."

Q. "Did you ever have any druggist telephone to you that you could only get the poison by coming to him and getting it in person?"

A. "I do not have any recollection of any one—"

Q. "Did you ever?"

A. "Pardon me. I have not finished my answer."

Q. "Go ahead."

A. "I have no recollection of any druggist having telephoned that to me."

Q. "If you had ever had any experience of that kind, you do not know it?"

A. "I don't remember it."

Q. "And such a thing as that would impress itself on your mind if it had occurred at that time, on December fourth?"

A. "I don't know whether it would or not."

Q. "After you got out there you still found Chrisman in pretty bad shape?"

A. "Yes, sir."

Q. "And he died that night at ten o'clock?"

A. "About that time I think."

Q. "Between the time that you got out there and the time he died, did you stay there all the time?"

A. "I was in the house all the time."

Q. "Did you stay there with your wife when your brother had died?"

A. "Yes, sir."

Q. "The next day was Tuesday; on that day you came back to Kansas City did you?"

A. "I came back to Kansas City in the afternoon."

Q. "Not until the afternoon?"

A. "No, sir."

Q. "Then that evening was the evening you were to

be elected president of the Jackson County Medical Society?"

A. "I was elected that evening."

Q. "You bought the six five-grain capsules of cyanide on Saturday and were at the Swope home on Sunday and at the Swope home on Wednesday, is that right?"

A. "I remember of being there Sunday and of being there Wednesday. I have described my other days as well as I can."

Q. "The next day you got cyanide was on the ninth, Thursday, was it not?"

A. "Yes, sir."

Q. "I see by your account with Brecklein that on the ninth you bought a dozen five-grain capsules of cyanide of potassium. Why was it necessary for you to buy more if you did not have time to use any?"

A. "You understand I did not say I had not used any, I had not had time to use any."

Q. "You bought your second lot of cyanide of potassium from Brecklein's Drug Store on December fourth, did you not?"

A. "I have no independent recollection of when those purchases were made."

Q. "I will read you from Exhibit 49, produced by Mr. Brecklein here in your presence, 'December fourth, six five-grain potassium cyanide capsules?' Is that correct?"

A. "It may be correct. I would not say it is not."

Q. "And Doctor, December 4th was Saturday, was it not?"

A. "Yes, sir."

Q. "And you bought that about what time of the day, about noon?"

A. "I have no way of fixing that. I did not at the time associate it with anything in particular and I have no way of fixing it."

Q. "In response to Mr. Walsh's question on direct

examination you said you telephoned that order in to Brecklein?''

A. ''That was my custom.''

Q. ''That is your recollection?''

A. ''That is my custom.''

Q. ''In response to Mr. Walsh's question you said Brecklein's clerk telephoned back and inquired of you—he called it to your attention?''

A. ''I remember on one occasion he did that.''

Q. ''And then you told him you wanted that for the purpose of killing cockroaches?''

A. ''I told him I wanted it for the purpose of killing bugs.''

Q. ''That is the first time you had ever made that experiment?''

A. ''That is the first time I ever told him that.''

Q. ''Or anybody else in your life?''

A. ''So far as I know. I don't remember definitely about that.''

Q. ''That after telling him that you wanted it for a certain purpose, do you deny that word was sent to you to come to get it from the hands of Hugo Brecklein himself?''

A. ''No, I do not deny that; I have absolutely no recollection of it.''

Q. ''Do you deny that you went to Hugo Brecklein's store to get this poison yourself?''

A. ''I do not deny it. I have no recollection of it. I did not associate it with anything at all and I would not any more remember that than if I had made any other purchase and passed by there to get it. It is my impression that it was delivered to me.''

The questions and answers then traced respondent's movements after buying the poison. He had stated that he had obtained same because he needed it to kill dogs

and that he had again made such purchases to destroy insects, and then again to remove nitrate of silver stains, and in the intervening period it was shown by the respondent's own admission that he had had no time to have utilized any of the said purchases although he had testified he had made each purchase for the purpose of filling immediate needs.

Q. "You seem to have been at your office four hours on Monday and four hours on Tuesday, did you say you didn't use it that day?"

A. "I didn't say that I did."

Q. "Then why was it necessary for you to buy a dozen more on the ninth?"

A. "I didn't say I didn't use it."

Q. "I am trying to find out the facts."

A. "I understand that you are."

Q. "Tell me why you bought twelve more capsules of poison on the ninth?"

(The "fever" capsule was given Margaret Swope on the fifteenth.)

A. "I suppose it occurred to me that I needed it."

Q. "For what?"

A. "For the purpose heretofore mentioned. I only used it for taking nitrate of silver stains from my fingers and killing these bugs."

Q. "You say you bought six in December for killing bugs and for anything else?"

A. "For removing nitrate of silver stains."

The defense was conducted by Frank P. Walsh, John M. Cleary, the firm of Johnson & Lucas, and R. R. Brewster, all noted criminal lawyers. Chiefly their theory was that these unhappy illnesses and deaths could have been caused from sources other than those outlined by the prosecution and that the state was unfairly persecuting the defendant.

The cross-examination of Dr. Walter S. Haines by Frank P. Walsh, attorney for the respondent, is of interest because it discloses some apparent unfairness on the part of the state in refusing to permit toxicologists for the respondent to examine any portion of the viscera or organs of the persons Dr. Hyde was suspected of murdering, thus depriving him of any opportunity of disputing the accuracy of the findings of the prosecution's medical experts.

Cross-examination of Dr. Walter S. Haines.

Questions by Frank P. Walsh.

Q. "You live in Chicago, Doctor?"

A. "I do."

Q. "You have lived there for a long time?"

A. "I was born there fifty-nine years ago?"

Q. "You lived there on the first day of March, 1910?"

A. "I did."

Q. "And everything that you did in this case you did at the request originally of Dr. Hektoen?"

A. "No, I can not say that. Most of what I did was done at Dr. Hektoen's request, but I received instructions from the prosecuting attorney and possibly—well, I am not sure about any other instructions excepting from Doctor Hektoen and the prosecuting attorney."

Q. "Did you meet Mr. Paxton?"

A. "I did."

Dr. Hektoen was the physician employed by the Swope family together with Mr. Paxton, their legal advisor, in the matters relative to the development of this case.

Q. "Did you receive a letter from the prosecuting attorney immediately prior to the twenty-fourth day of March, in which he stated that he wanted to make another search for cyanide and that if necessary funds would be forthcoming from Mr. Paxton."

A. "I do not remember ever to have received such a letter."

Q. "Did you see a letter of that kind making that statement at the close of the letter that funds would be forthcoming from Mr. Paxton?"

A. "No, I do not remember ever to have seen such a letter."

Q. "When you speak of a trace of strychnine, what do you mean?"

A. "I mean a quantity so small that it can not be accurately weighed."

Q. "Now the smallest amount of strychnine that can be weighed on a chemist's analytical balance is one-tenth of a milligram?"

A. "Well, I doubt very much whether that quantity of strychnine can be weighed with accuracy on a balance."

Q. "You doubt even if that quantity could be weighed, isn't that correct?"

A. "I doubt it."

Q. "And that one one-tenth of a milligram is one six hundred fortieth of a grain?"

A. "Yes. One six hundred fortieth to one six hundred fiftieth of a grain."

Q. "Well, that is close enough, one six hundred fortieth?"

A. "Yes, some regard a milligram as a sixty-fourth and others a sixty-fifth and others a sixty-sixth."

Q. "How do you regard it?"

A. "I calculate it as a sixty-fifth, but it is difficult to translate the metric into the English system."

Q. "You say that when strychnine is administered that it goes to all parts of the body?"

A. "Yes, it does."

Q. "And that is true whether it is administered by mouth or hypodermically?"

A. "Yes, that is true."

Q. "Strychnine has a large use medicinally, has it not, Doctor?"

A. "Yes, it is used very extensively."

Q. "Up until the first day of March, 1910, you had found no cyanide of potash in any degree or to any extent in any of the vital organs of Chrisman Swope, had you?" (Witness refers to memorandum.)

A. "No, I had not."

Q. "And, Doctor, would you mind letting me look at that memorandum you have?"

A. "Certainly."

Q. "And you had tested for the same?"

A. "Yes, I had applied one test."

Q. "You had been directed to examine it for all poisons, had you not?"

A. "For all poisons that were indicated by the symptoms."

Witness had testified that he had first found no strychnine and the foundation is being laid for an inference to be given to the jury that the doctor has been inspired in some manner by those interested in the prosecution to manufacture this damaging evidence.

Q. "Now, then, you also had one of these capsule shells, did you not, Doctor?"

A. "I had both of them."

Q. "Did you or did you not, prior to the third day of February, 1910, make a test of the capsule shell for all poisons and report the result of that test to John G. Paxton?"

A. "I am not positive as to the date, but I will say that I tested the fragments of capsule in one of the en-

velopes for strychnine and other alkaloids and made a report to Dr. Hektoen."

* * *

Q. "Had you taken that capsule and attempted to draw off from it any alkaloidal substances that were in it?"

A. "Yes, I had tested it for strychnine and other alkaloids exclusively."

Q. "And applied the usual tests to find that out?"

A. "I had."

Q. "Now then, up to the first of March then you had found no poisons of any kind in this vomit; is that correct?"

A. "I had not found —"

Q. "And up to the first of March you had not found poison of any kind in this capsule?"

A. "Not in the capsule itself."

Q. "And up to the first of March you had found nothing in the viscera of Chrisman Swope except a mere trace of strychnine; is that correct?"

A. "Yes, that is correct; remembering that I did not test the capsule in the first envelope for anything excepting strychnine and alkaloids."

Q. "I remember all of those things. Now, if you can I would like you to answer my questions, Doctor."

A. "I am not positive as to the date, but I will say that I tested the fragments of capsule in one of the envelopes for strychnine and other alkaloids and made a report to Doctor Hektoen."

Q. "Did you not make a report to Doctor Hektoen prior to the third day of February, 1910, that you have since learned was transmitted to John G. Paxton, in which you stated that you had made a test of this vomit for strychnine and found none present and that you had

made a test of the capsule for all poisons and found none present?''

A. ''No, I did not make a report of that to Doctor Hektoen; I reported to him I did not find —''

Q. ''One minute, did you make the report in writing?''

A. ''No, I reported to him verbally. I reported to Doctor Hektoen that I found no strychnine or other alkaloidal poison in that capsule. That was the entire report.''

Q. ''Is that all that you reported to Doctor Hektoen?''

A. ''That was all I reported regarding the capsule. It was all I had tested for at that time.''

As has been stated the prosecution was able to prevent the respondent's counsel and experts selected by them from examining any portion of the bodies of the victims. Counsel now goes into this subject at some length in an effort to show that the State's witnesses had something to hide and were not willing to expose the whole truth.

Q. ''I will ask you if it is not a fact, Doctor, you know Doctor Smith?''

A. ''I do.''

Q. ''He is a man well known in the scientific world?''

A. ''He is.''

Q. ''A man of good repute?''

A. ''He is.''

Q. ''And a man that you knew as a scientific man?''

A. ''That is true.''

Q. ''He was connected with the Fordham University in New York?''

A. ''So I understand.''

Q. ''And you know that, Doctor?''

A. ''Only by hearsay.''

Q. ''And conducts a laboratory in New York?''

A. ''Yes, I know that.''

Q. "And you have known Doctor Smith for some time personally?"

A. "I have for three or four years."

Q. "You knew Doctor Smith when he called?"

A. "Yes, I did—I did not know that he called —"

Q. "I am just getting to that. Is it not a fact that you heard Doctor Smith talking at your front door and did you not send word down by the maid at your house that you were absent?"

A. "Oh, not at all, absolutely not."

Q. "Did you afterwards—did you leave that day?"

A. "I left that afternoon."

Q. "You left that afternoon for what place?"

A. "For Philadelphia."

Q. "Now, on the fifth day of March, 1910, you did meet Doctor Smith, did you not in the lobby of the Bellevue-Stratford Hotel in Philadelphia?"

A. "Yes, I did."

Q. "And he introduced to you Doctor Walter M. Cross, city chemist of Kansas City, did he not?"

A. "Yes, he did."

Q. "Now, up to that time, that was on the fifth, you had not found any cyanide of potash in any of the internal organs of either Chrisman or Thomas Swope; you had found no strychnine in the vomit of Margaret Swope; and you had found no poison in the capsules that were given you to analyze, that is true is it not?"

A. "Yes, that is true; I had not tested, however, one of the capsules at that time, nor had I —"

Q. "But that is true, what I asked you?"

A. "That is true, to the —"

Q. "Dr. Smith demanded of you at that place, did he not, a portion of the viscera of Chrisman Swope and of Thomas Swope for the purpose of making an analysis of it?"

A. "He demanded a part of the viscera; I am not sure what he said it was to be used for, but he did demand a part of the viscera."

Q. "Did he not read this to you, Doctor: 'On behalf of Bennet Clarke Hyde, we hereby make of you the following request; Will you please turn over to us at once a sufficient portion of the organs removed from the body of Thomas H. Swope, deceased, so that a careful examination may be made of the same for the purpose of ascertaining whether or not they contain any poison.' Is that not the exact language?"

A. "He read some document to me, but I could not say it was that."

Q. "I will ask you if you do not recollect, Doctor, that it was that in substance?"

A. "No, I could not say that it was or was not. He read me a document but I could not say whether it was that or not."

Q. "I will ask you now if he did not also make this request of you at the same time; 'On behalf of Bennet Clarke Hyde, we hereby make of you the following request; Will you please turn over to us at once a sufficient portion of the organs removed from the body of Chrisman Swope, deceased, so that a careful examination may be made of the same for the purpose of ascertaining whether or not they contain any poisons'?"

A. "No, I can not tell you whether that was the exact language that was used or not."

Q. "Was that it in substance?"

A. "They demanded a part of the organs of Thomas H. Swope and Chrisman Swope."

Q. "Did they not also say in that demand, Doctor, and do not you recollect it now that they wanted those organs so that a careful examination might be made for the purpose of ascertaining whether or not they contained any poisons?"

A. "They may have done so, I do not know. I can not remember."

Q. "Now, then, you first stated to Doctor Smith that you were at home when he called in Chicago, but that you thought it was a newspaper reporter and therefore, had the maid state that you were not at home, did you not?"

A. "Oh, I did not; no."

Q. "You did not say that to him?"

A. "No. What I stated was this, that I was surprised when he told me that he had called on me in Chicago —"

Q. "Did you state to Doctor Smith and Mr. McGurdy in the presence of Doctor Hektoen that you refused to give any part of this viscera of your own volition. Did you make that answer to Doctor Smith and Mr. McGurdy in the presence of Doctor Hektoen?"

A. "I think I probably did, and for this reason, that I did not feel that I had any right to give any part of the organs that had been entrusted to me to anyone else without the proper order from the proper officials and moreover I had been informed when I came to testify before the grand jury here that I should not—that I should not discuss this question that was there brought out, with any person else."

Not a great deal was gained by the following portion of the cross-examination of this witness wherein he was required to demonstrate the manner in which tests for poison contents in the stomach and various portions of the body are made but later the contradictory elements of the Doctor's evidence wherein he had testified that at first he had found no evidence of guilt from the analysis and then again later had, were given a searching review.

Q. "Now Doctor, I will ask you first to describe to the jury how do you distill the stomach contents for the

purpose of making a test for cyanide of potassium, hydrocyanic acid?''

A. ''The stomach contents are vitally acidified with acid and placed in a flask with a broad bottom. This was connected with a glass tube with a condensing apparatus and the mixture was then gently heated with constant agitation.''

Q. ''What is the name of the second flask you use?''

A. ''Condensing apparatus.''

Q. ''Now is there heat in the condensing apparatus?''

A. ''No sir; that is cooled.''

Q. ''Now, how is the heat, where is the lamp, where is the heat that is applied to the flask in which you have the liquid or material?''

A. ''The flask in the particular case in which Doctor Vaughn and I examined the stomach contents was placed on a thin piece of asbestos cardboard and this was placed on two or three thicknesses of wire gauze. I was about to say how the heat was applied. The heat was applied underneath the flask with constant rotation of the burner, gas burner, and with constant rotation of the flask.''

Q. ''So that the heat was applied directly under the flask in which the fluid was contained?''

A. ''Yes, sir—separated from the heat —''

Q. ''By this wire gauze?''

A. ''By the asbestos cardboard and wire gauze.''

Q. ''And the effect that heat had was to condense or evaporate the liquid in the flask?''

A. ''Yes, sir, it did.''

Q. ''That was the way you attempted to do it the first time or how did you do it the first time that you found there was no cyanide in it?''

A. ''No, sir. I didn't use that the first time?''

Q. ''How did you condense it the first time?''

A. ''I didn't use the distillation process the first time, at all.''

Q. "From the stomach contents of Thomas H. Swope. That is what you are talking about, is it not, Doctor?"

A. "That is what I thought you referred to."

Q. "Now, it was on the ninth of March then that you say you for the first time found what you would say to be cyanide in the capsule, is that right?"

A. "Yes, sir; in the capsule, but I had previously found cyanide in the paper."

Q. "I heard what you said, I am asking you about the capsules and if you will answer my question this will all be well and good.

"Now, Doctor, will you answer me that question directly, on the ninth of March, 1910, is the first date that you claim to have found any trace or evidence of cyanide in the capsule cover?"

A. "Yes, sir. That is true as far as the capsule is concerned."

Q. "And on that date you made a test for cyanide in the liver of Thomas H. Swope with Doctor Vaughn?"

A. "I did."

Q. "And you found none?"

A. "I found none."

Q. "And on that day you made an examination of the sputum of Miss Margaret Swope for cyanide and you found none?"

A. "That is correct."

Q. "And prior to that time, you, yourself, had made an examination of the sputum of Margaret Swope for strychnine and had found none?"

A. "Previous to that I had made an examination of a small part of and had found none, and had made an examination with Doctor Vaughn of a larger part of it and had found it."

Q. "On what date?"

A. "February fourth."

Q. "And where were you then?"

A. "At Ann Arbor, Michigan, working in conjunction with Doctor Vaughn."

Q. "Had you talked to Doctor Hektoen on the evening before you went to Ann Arbor?"

A. "I don't remember that I did."

Q. "Did you go to Ann Arbor on the third?"

A. "I think I went there the night of the second and reached there the morning of the third."

Q. "Is your recollection pretty clear on that?"

A. "Yes, sir. I am quite sure about that. I went there on the night train."

Q. "But at that time, you had made this report to Mr. Paxton prior to February fourth, that you yourself had examined it and found no strychnine in it?

"The vomit of Miss Margaret, I am speaking about?"

A. "Yes, sir. I had reported to Doctor Hektoen that I had failed to find strychnine in the sputum of Miss Margaret Swope."

Q. "And that you had made a chemical analysis for the purpose of finding it?"

A. "Yes, sir. I told him I failed to find it."

Q. "Now, did any person except you make any examination of the viscera of Chrisman Swope, up to the twenty-fourth day of March, 1910?"

A. "No, sir; I think not."

Q. "Had any person—has any person ever made any examination of that since that time?"

A. "On the twenty-fourth day of March, Doctor Vaughn and I examined the stomach contents together for cyanide."

Q. "Did you examine the stomach contents of Chrisman Swope at that time together for strychnine?"

A. "No, sir, we did not."

Q. "Did you examine the liver of Chrisman Swope, at that time, for strychnine?"

A. "No, sir, we did not."

Q. "Has any person, so far as your knowledge goes, ever examined the viscera of Chrisman Swope since that time for strychnine?"

A. "Not that I know of."

Q. "Have you always had it in your possession?"

A. "It was first in Doctor Hektoen's possession. He gave it to me and then I gave it to him, such parts as were left."

Q. "But it has never been out of your possession except the time you returned it to Doctor Hektoen, until this day?"

A. "No, sir; it was not out of my possession during that time, from the time it was given to me by Doctor Hektoen until it went back to Doctor Hektoen. It was always in my possession during that time, excepting only a part of the stomach contents which I took over to Ann Arbor, and during the time I was there it was in Doctor Vaughn's possession."

Q. "Did you take anything except part of the stomach contents of Chrisman Swope to Ann Arbor?"

A. "No, sir, I did not."

Q. "And when did you give back the viscera of Chrisman Swope to Doctor Hektoen?"

A. "I think it was last week, Wednesday or Thursday."

Q. "So that up to this time the result of your research on Chrisman Swope was that you found a trace of strychnine too small, that is so far as strychnine is concerned, too small to weigh or purify. That is correct?"

A. "That is correct."

Q. "And you made a test of the stomach contents,

at Ann Arbor, or several tests and one test showed to you a condition that you say might probably indicate cyanide?''

A. ''That is correct.''

Q. ''Possibly indicate cyanide. Now, that is the total result, so far as you are able to say, of all of your examinations and all your analysis on the viscera of Chrisman Swope?''

A. ''That is correct.''

Q. ''Now, let me see, Doctor, if you will, how you got at this quantity of strychnine that you say you found in the stomach of Thomas H. Swope. Could you get at it so as to weigh it?''

A. ''Yes, sir.''

Q. ''Did you weigh it?''

A. ''Yes, sir. I weighed it. It was not entirely pure, but I weighed it.''

Q. ''If it was not entirely pure that means that it had some other crystalline substance along with it that comes from a dead body?''

A. ''The other substance was not crystalline.''

Q. ''Well, it had some other substance mixed with it, and when you weighed it you weighed this coloring matter mixed with it?''

A. ''Yes, sir.''

Q. ''And, of course, you could not tell how much coloring matter there was or how much strychnine?''

A. ''I could form a very good judgment.''

Q. ''I know but I mean you could not tell by weighing it?''

A. ''No, sir, I could not tell by weighing it.''

Q. ''And you didn't weigh it. Now out of how much of the stomach contents did you get, of the stomach contents of Thomas H. Swope, did you get these particulars you estimate at something less than one two hundredths

of a grain, which you say was mixed with other impurities?''

A. ''That was from half of the stomach contents.''

Q. ''And how much did you estimate that you got from half of the stomach's contents?''

A. ''One two-hundredths of a grain.''

Q. ''Didn't that apply to the whole stomach contents?''

A. ''No, sir, that was from half.''

Q. ''That was from half of the stomach contents?''

A. ''Yes, sir.''

Q. ''What other impurities were mixed with that strychnine?''

A. ''It was not entirely colorless. There was, therefore, coloring matter mixed with it, and I think that was all.''

Q. ''Could you separate the coloring matter from it by any process known to your science?''

A. ''I didn't feel that I could without wasting the strychnine.''

Q. ''Without wasting the strychnine, so that you then took what you got really Doctor, some color reaction, took it with its impurities and merely made an estimate that it was something less than two-hundredths of a grain?''

A. ''Yes, sir. I estimated that it was something less than one two-hundredths of a grain.''

Q. ''You didn't weigh it at all?''

A. ''I weighed it, but there was some impurities mixed with it.''

Q. ''You weighed it with the impurities?''

A. ''Yes, sir, there was coloring there.''

Q. ''And you could not tell this jury how much impurity there was there?''

A. ''No, sir, not absolutely. I could not say from the

intensity of the test, the reaction produced, that it was not quite pure but was nearly so."

Q. "You mean the color reaction?"

A. "The reaction."

Q. "Now, Doctor, you knew when you examined the body of Chrisman Swope that he had taken strychnine before he died, that is, that he had had hypodermic injections of strychnia?"

A. "I am not sure whether I knew it at the time I made my examination or whether I learned it subsequently."

Q. "You expected to find some strychnine, didn't you?"

A. "No, sir. I had no idea in advance what I should find."

Q. "It had not been suggested to you at all what you could find?"

A. "Oh, yes, it had been suggested that I look for strychnine."

In conclusion counsel attempted to show the jury that this doctor had made these tests alone and also that the substance of his testimony was being manufactured by those interested in the prosecution.

Q. "Did you make any test whatsoever of any of the liver substance of Thomas H. Swope, alone?"

A. "No, sir; I did not."

Q. "When you were alone?"

A. "No, sir, I did not."

Q. "Now you stated last night, I believe, or yesterday afternoon, that you found a trace of strychnine in the liver of Thomas H. Swope, and you said this morning if you said that it was a slip of the tongue. Is that correct?"

A. "Yes, sir, it is."

Q. "Last night had you gone over your testimony

yesterday with the attorneys on the other side in this case?''

A. ''We had a consultation last night, and they directed—they asked me if that statement that it was a trace was correct.''

Q. ''Did you go over it?''

A. ''I said if I stated it to be a trace I had made a slip of the tongue.''

Q. ''Did you go over your testimony, last night, outside of that one place?''

A. ''No, sir.''

Q. ''That was the only place they directed your attention to?''

A. ''I don't remember of any other. We had a general talk, but that is the only specific point in connection with my testimony given yesterday afternoon.''

Q. ''Was Doctor Vaughn there?''

A. ''He was.''

Q. ''And Doctor Hektoen?''

A. ''Yes, sir.''

Q. ''And you went over in a general way your testimony of yesterday afternoon?''

A. ''No, sir, most of the time was spent upon other questions.''

Q. ''Questions about this case?''

A. ''Certainly.''

Q. ''And about your testimony in this case?''

A. ''Yes, sir, questions or matters that were to be brought up today.''

Q. ''That you would probably be asked about on cross-examination?''

A. ''No, sir, chiefly questions that they would ask me.''

Q. ''And Doctor Vaughn was there?''

A. ''He was.''

Q. "And Doctor Hektoen was there?"

A. "Yes, sir."

Q. "And you went over it in the presence of each other?"

A. "Yes, sir, we were all together."

Q. "Did you know there was a rule on the witnesses requiring them to remain out of hearing of the other witnesses when they were testifying and not to talk about their testimony in the presence of each other?"

A. "No, sir, I did not. I knew there was a rule excluding us from this room."

Q. "But you thought it would be all right to just talk it over what each was going to testify to, in the presence of each other?"

By the Court. "Did you do that Doctor?"

A. "Yes, sir; we all talked it over. The attorneys asked us questions, sometimes asking Doctor Vaughn, sometimes Doctor Hektoen, and sometimes me."

By Mr. Walsh. "All of you together?"

A. "Yes, sir."

The many other cross-examinations in this case were all of unusual interest but too long to be included here. It may be understood that the questions and answers given in this chapter are not exhibited in their entirety in the consecutive order rendered in the actual records of the case but are selected therefrom relative to the subject and substance of their particular objectives at the time.

CHAPTER 25

HENRY FORD v. CHICAGO TRIBUNE

One of the most notable and interesting trials in the annals of the American courts was the libel suit of Henry Ford against the Chicago Tribune, tried in the Circuit Court at Mt. Clemens, Michigan, during the summer of 1919. After his re-election in 1916 President Wilson toured the country in an effort to arouse public sentiment in favor of preparedness. Shortly thereafter, during the spring of that same year, Henry Ford published, in the leading metropolitan daily newspapers of the country, full page advertisements, charging that a clique of militarists in this country were advocating preparedness for their own private and selfish purposes and bitterly castigating the effort then being made by the President and others to create public sentiment in favor of preparedness. These advertisements started out by saying that he believed the United States was confronted by the greatest danger in its history; that that danger was internal in character and was that of militarism.

About the same time, Ford published a pamphlet which was given wide circulation over his own signature, entitled "War and Peace" in which again, the danger of militarism was stressed. This pamphlet, it was alleged at the trial, was actually written by a Mr. DeLavigne, a well known pacifist. To all of these activities on his part the Chicago Tribune took pointed and sarcastic exception in a series of editorials and among other things, charged Ford with being an anarchist and guilty of pursuing a course highly detrimental to the nation's interests. Because of these editorials, Ford brought suit in

the Circuit Court at Detroit against the Chicago Tribune for libel, claiming damages of one million dollars. A change of venue was taken to Mt. Clemens. The trial lasted some three months and the jury finally returned a verdict of six cents. An interesting feature of the case to the legal profession was the extended cross-examination of the plaintiff himself. The cross-examination was conducted by Elliot G. Stevenson, now deceased, of the then firm of Stevenson, Carpenter, Butzel and Backus of Detroit.

The following are excerpts therefrom. Mr. Stevenson read from one of Ford's advertisements: "I will do everything in my power to prevent murderous, wasteful war in America and in the World. I will devote my life to fight this spirit which is now felt in the free and peaceful air of the United States, spirit of Militarism, mother to the cry of preparedness—preparedness, the root of all war."

Q. "What did you mean by that?"

A. "Over-preparedness."

Q. "Was anybody suggesting over-preparedness?"

A. "I thought so."

Q. "In what? Who did? In what way?"

A. "Everyone seemed to be for preparedness. The President was for preparedness, wasn't he?"

After objections, which were overruled, Mr. Stevenson offered a pamphlet containing the speeches made by President Wilson after his address to Congress in December, 1915. The pamphlet was printed in April, 1916.

Q. "In the 'concerning preparedness' that has been admitted in evidence, this appears, and you say 'Do we need preparedness?' The President himself, in his speeches made recently in the middle west, could find no fear of invasion, and his inconsistencies were pointed out even by the most ardent editorial advocates of the

'preparedness' plan. In December, 1914, the President, in his message to congress said 'etc. etc.' Now, you knew of the President's speeches?''

A. ''Mr. DeLavigne did, I suppose.'' (The supposed author of the pamphlet.)

Q. ''Did you? Are these your sentiments, or are they Mr. DeLavigne's.''

A. ''I am responsible for them.''

Q. ''You knew the President had made speeches, that you were undertaking to answer by these advertisements?''

A. ''I did to that extent, and I am responsible for that.''

Q. ''You are familiar with public matters?''

A. ''Quite a little.''

Q. ''You became an educator and assumed the role of educator for the American people?''

A. ''Possibly so.''

Q. ''You gave out the public announcement that you were going to spend $1,000,000 and afterwards raise it to $10,000,000?''

A. ''I don't remember that.''

Q. ''You undertook to advocate them, and made reference to the President's speeches he delivered in Congress in December, 1913, and subsequently throughout the country in the early part of 1916?''

A. ''Possibly.''

Q. ''Possibly? Is there any doubt about that?''

A. ''Well, if it is in the book.''

Q. ''You regarded the President as your friend, didn't you? You have become well acquainted with him and you knew him very well, and you regarded him as your friend, didn't you?''

A. ''I regarded him as the President of the United States. I can not say as I regarded him as my friend.''

Q. "Didn't you come to have very close relations with the President?"

A. "Yes, I talked to him a number of times."

Q. "You became a candidate for United States senator at his request?"

A. "Yes, sir."

Q. "You visited him at Shadow Lawn, didn't you, his summer place, visited him at Washington by invitation?"

A. "Yes, sir."

Q. "Are you willing to say, or are you unwilling to say, that you regarded him as your friend?"

Mr. Alfred Lucking: "I object to that; he is referring to a time in December, 1915, and he drags in matters that have happened long since, and he puts them all in the one question."

A. "I will say, yes, sir, that I regarded him as my friend."

Q. "And the President came out into the country, all through the great western cities, and the middle state cities, to make addresses upon the things of interest to the public, from his standpoint, and you sought, Mr. Ford, by these publications, did you not, to counteract the influence of the President's speeches to the people of the United States, upon the questions that he considered vital?"

Objected to by Mr. Lucking.

The Court: "I am still of the opinion that Mr. Ford's view on preparedness is not material; but the method of expressing those views, or the time of expressing them, might be material, something of that kind. I don't know just what the proposition is."

When the question was admitted the witness said:

A. "I sought to express my views on it."

Mr. Stevenson, referring again to the pamphlet:

Q. "I call your attention to where you used the word 'murderer,' or 'murderers,' No. 1; this is No. 2 'I want to see this nation, and all the nations of the earth, nourishing that feeling, already deeply implanted in the minds and hearts of millions, that is expressed in the words "We do not want war; we will not have war; we will not have amongst us the breeders of war; be they men who cry out that the enemy seeks us, and we must prepare for him, or be they only those who would dazzle with the false glory that has been the cloak of murder for centuries."' "

Q. "What did you mean by that, Mr. Ford?"

A. "Militarism."

Q. "You think all war is murder?"

A. "Yes."

Q. "And anybody that advocates preparedness for war, is a murderer, also?"

A. "Not if it is in defense."

Q. "Weren't you advocating, at that time, absolute non-preparedness and absolute disarmament, in August, 1915?"

A. "If it led to a league, yes."

Q. "There was nothing about a League of Nations in your writings, at this time, was there?"

A. (No answer.)

Q. "Do you know of anybody that was trying to drive the country into the slaughter?"

A. "I thought there were many people that were."

Q. "Can you give us the name of one?"

A. "No."

Q. "And yet you made the statement in this booklet that there was a ring trying to impress the President and force him into war?"

A. "I did say that, yes."

Q. "I think you said in this book, Mr. Ford, that the President was a very great man?"

A. "Yes, sir."

Q. "Have you changed your mind?"

A. "I think he is a greater man now."

Q. "You say you don't know anybody that was advocating over-preparedness?"

A. "I don't know any person."

Q. "Did you know at that time in 1915, when that book was put out?"

A. "I knew there was numbers, but I didn't know any particular person."

Q. "Was the President one of them?"

A. "If the book says so, he was. I thought perhaps he was; maybe he was."

Q. "You thought the President was one of the men advocating preparation to commit murder?"

A. "War is murder."

Q. "That is the only view of war you have, is it?"

A. "Yes, I think there is a better way."

Q. "Have you any other view about war than that it is murder, and everybody engaged in war is a murderer?"

A. "I am strong for preparedness now unless we have a League of Nations."

Q. "You are?"

A. "Yes, sir, right to the hilt."

Q. "You were not strong for preparedness in 1915?"

A. "No, I thought we were adequate enough."

Q. "You think now, that preparedness would be an insurance against war, don't you?"

A. "If it was used immediately, and clean it up, yes, sir."

Q. "Are you in favor of having a great army now, to go over and clean it up?"

A. "Unless we get a League of Nations."

Q. "So that, if we don't get a League of Nations, you want this government, this country to go to war again?"

A. "I want them to clean it up now and for all time to come."

Q. "How are you going to clean it up?"

Objections.

Q. "You still think men who go to war are murderers?"

A. "Not men who are pressed into war."

Q. "But the men who are pressed into war have to be led by professional soldiers, haven't they?"

A. "They are the ones, yes."

Q. "The men like General Pershing are murderers, is that the idea?"

A. "Well——"

Q. "He is a professional soldier, isn't he?"

A. "I don't know whether he is or not."

Q. "That has been his life work, defending his country's interest as an officer, first as lieutenant, then as a captain, and on up until he got to be the highest officer in the United States army, that is true, isn't it?"

A. "I think General Pershing will say that he has committed many a murder."

Q. "He is one of the men that you classified as a murderer, is he?"

A. "He is a professional soldier."

Q. "What do you mean by murderer?"

A. "Killing people."

Q. "Killing people because it is necessary to protect the interest of the public; do you call that murder?"

A. "Killing anyone is murder."

Q. "You think it is murder to kill people, to uphold the rights of the people of the United States?"

A. "If it is unnecessary."

Q. "Let us go a little further on your idea of a murderer. You say all professional soldiers—and that includes General Pershing?"

A. "All professional soldiers, yes, sir—I don't know —"

Q. "General Grant was one of those professional soldiers, wasn't he?"

A. "Yes, and I think he said that war was murder, too."

Q. "I think you are mistaken. General Sherman said that war was hell, but he never said it was murder, that I ever heard of, did you?"

A. "I think General Sheridan said it was murder."

Q. "In what way do you distinguish between the professional soldier and the rank and the file?"

A. "The professional soldier is a man who makes a living out of it."

Q. "You proposed or wanted to influence the public to prevent any additions to the army because you called it murder, that is true? or any additions to the navy?"

A. "Not if we had sufficient to protect ourselves."

Q. "What is the difference between the army and the navy in your view. Any difference. Is it any much less murder to kill a man there than it is on land?"

An objection was sustained.

Q. "You knew the government at this time, in 1916, or thereabouts, was endeavoring to get recruits for the army?"

A. "Yes, all of the time, I think."

Q. "And the purpose of your publication was to influence the public not to recruit for the army, was it not?"

A. "To influence them what war was."

Q. "Don't you recollect that on account of just such

talk as this that the government was compelled to adopt conscription?"

A. "I think conscription is the only fair way."

Q. "Didn't you say conscription was one of the things to be hated in your article?"

A. "That is the law; that is when we have it."

Q. "Didn't you say that conscription was the basis for militarism?"

A. "I don't know about that; I don't think so."

Q. "You thought conscription was a good thing?"

A. "I know conscription is the law."

Q. "What you said while you were opposed to all increases in the army, if it had to be increased, the fairest way to do it, would be by conscription?"

A. "That is the proper way—the fairest way."

Q. "I call your attention to 'Concerning Preparedness.' 'Conscription, the base of militarism, is advocated openly.' What do you mean by that?"

A. "I think Mr. DeLavigne wrote that. I am responsible for it, but I think he added that paragraph."

Q. "It is not in accordance with your views?"

A. "Not just like that."

Q. "You put these things in circulation throughout the United States, for the public to read and be influenced by them?"

A. "Yes."

Q. " 'I have no other purpose than to save America from bloodshed, and its young men from conscription.' Is that Mr. DeLavigne too?"

A. "If it was in there, it went out, it was Mr. DeLavigne."

Q. "Do you believe in the right of a nation to defend itself?"

A. "Yes."

Q. "How? By disarming?"

A. "By getting prepared up to date."

Mr. Stevenson read from Peace vs. War the following:

"The advice of militarists as to the need of a vast army and navy is about the same as the advice of a group of professional gamblers would be in framing civil laws. The only difference is that the military men would gamble with human lives and the peace and plead for 'national honor' when they mean 'personal glorification' or 'blood money.'"

Q. "This compares people who advocate preparedness, with gamblers, and with professional gamblers, and makes the distinction that a professional gambler is a more respectable man, because the military man is gambling with human lives instead of money?"

A. "Yes, sir."

Q. "In other words, you put the soldier below the professional gambler?"

A. "Yes. They gamble with lives. The gambler does not do any harm."

Q. "You prefer the gambler to the professional soldier?"

A. "Yes, sir."

Q. "Do you think there is any professional gambler that has done more for this nation than General Grant?"

A. "No, I don't think so."

Q. "General Pershing is a professional soldier, isn't he?"

A. "General Pershing has done a good job. He ended all wars."

Q. "Did you think General Pershing was a murderer when he went into Mexico after Villa, who had raided and robbed and killed and murdered American citizens?"

A. "No. He was sent there by the President, I believe."

Q. "He went there to kill people, didn't he?"

A. "No he went there to pacify them, I believe."

Q. "Didn't he go there to kill Villa, if he could? Wasn't that his special mission, to go there and kill Villa?"

A. "I understand he went to catch him."

Q. "Now, in advocating and conveying to the public that these men who promoted preparedness and advocated preparedness were promoting murder and were worse than professional gamblers, didn't you expect that would incite the prejudice and the ill-will among people against this question of preparedness? I am going to talk now about Mooney. You know who Mooney is?"

A. "No, I don't know who Mooney is. I have heard a little about it.

Q. "You know that he was charged at a preparedness parade in San Francisco, in conjunction with others, with throwing some bombs and killing a lot of people who were in the parade, and wounding a lot more? I want to ask you if you can not see the connection between the prejudice that you were creating in the minds of the public by characterizing everybody who advocated preparedness as black legs and murderers and profiteers and all that sort of thing; and the fact that somebody got excited and prejudiced about it and dropped this bomb among the men who were parading?"

A. "I claim he had no right to drop bombs. We had a right to ——"

Q. "Had you any right to incite him by this kind of propaganda?"

A. "We were only educating."

Q. "And I again continue (reading) 'What can we think of men who cry aloud against murder and yet fly eagerly to place in the hands of their children, or more frequently, the children of their more humble brothers, the implements of murder?' What did you mean by

'implements of murder?' Guns, pistols, swords, anything of that kind?''

A. ''Anything, yes, sir.''

Q. ''Liberty motors? Liberty motors?''

A. ''Anything, yes, sir.''

Q. ''Henry B. Joy is a friend of yours?''

(Henry B. Joy, President of the Packard Motor Car Co.)

A. ''Yes, we're neighbors and friends.''

Q. ''You called him an apostle of murder, didn't you?''

A. ''I didn't call him an anarchist.''

This led to a discussion of terms, ''tools of the interests'' used in Mr. Ford's articles which were made to apply to the Tribune articles advocating preparedness.

Q. ''Preparedness was the rock on which you split, wasn't it?''

Mr. Ford, after some questions, admitted he had so testified the previous day.

He admitted that what he had once said about the oceans being barriers against invasion did not apply to the same extent as previously.

Reverting to Mr. Joy, Mr. Stevenson asked:

Q. ''Mr. Joy, as you know, in the Spanish-American war was one of the young men who went out to defend their country and their flag, wasn't he?''

A. ''I know he went on a ship and went down to Cuba.''

Q. ''And because he differed with you, you called him an apostle of murder, didn't you?''

A. ''I wish you wouldn't press me too hard on that.''

Q. ''You did not understand Mr. Joy was for war for war's sake, did you?''

A. ''I told him, to his face, he was a munitions patriot.''

Q. "You sent out broadcast all over this land, this publication charging Mr. Joy, your neighbor and friend, that he was an apostle of murder?"

A. "Yes."

Q. "Because his company was under contract to do some war work?"

A. "We are neighbors and friends yet, too."

Q. "You are answering Mr. Joy's argument, now. You said: 'One local apostle of murder is working under a handicap, for he is known to be interested in the manufacture of munitions of war. It would hardly be expected that such a man could do anything but attempt to place a halo around the trade that pays such big dividends. It must occur to every thinking man as a peculiarly striking argument against war, that the only men who rise to defend it are those who fatten on the blood of the men who perish!' By that you meant to convey to the public that Mr. Joy was one of the men who fattened on the blood of the men who were sent to war to perish, didn't you?"

A. "It is in that book; that I am responsible for."

Q. "I quote from Mr. Joy's article: 'Mr. Ford believes in peace, as do all his fellow countrymen. Mr. Ford's desire to accomplish permanent peace is a very laudable object. We should all join forces to that end, but will not Mr. Ford's attitude urging strict non-preparedness, and, therefore, necessarily the acceptance uncomplainingly of any demand for tribute or indemnity, or any insult or harm to Americans by the visitors in the European conflict, only tend to promote the recurrence of war. Will any peace, which is only a peace during which to prepare and recuperate, be a beneficial peace?' You agree with that, don't you?"

A. "Yes, I agree with that."

Q. "Since you have had the experience of this war?"

A. "Yes."

Q. "Mr. Joy, in 1915, was advocating the correct principle, wasn't he?"

A. "Not if he was wanting over-preparedness."

Q. "Over-preparedness?"

A. "Over-preparedness."

Q. "That seems to be a sweet morsel, the word 'over?' You know that what Mr. Joy said; 'Mr. Ford's desire to accomplish permanent peace is a very laudable object. We should all join in force to that end.' He was in favor of peace, just as you were, wasn't he?"

A. "Yes."

Mr. Stevenson read from advertisement, "Concerning Preparedness," a reference to President Wilson's alleged change of attitude on preparedness between December, 1914, and December, 1915:

"Since that time the president said he had changed his mind. No personal vacillation, however, can change the facts, and in spite of rumors and suggestions of fear, there have been no material facts placed before the people of this country to show that the president had any military reason for his change of mind. The people should think for themselves and demand to know the facts."

Q. "That is a pretty harsh criticism of the President isn't it?"

A. "Yes."

Q. "I want to know what is in your mind?"

A. "It is in the book; he may have been playing politics, there is no question about that. I am trying to say that the President may have been playing politics and if he was, he thought the end would justify the means, knowing him as I do."

CHAPTER 26

THE PREVOST MURDER TRIAL

The cross-examination of Lloyd Prevost by Alexander J. Groesbeck, on trial in the circuit court at Mt. Clemens, Michigan, a few years ago, charged with the murder of J. Stanley Brown, is of unusual interest to the legal profession not alone because of the excellence of the examination itself, but for the additional reason that this is one of the very few instances where the refusal of the defendant to answer questions in a John Doe inquiry prior to the trial was used as the basis of a cross-examination which was largely responsible for the conviction of the defendant.

Shortly after it became known that Brown had been murdered, a John Doe inquiry was instituted before Justice William F. Sawn, of Mt. Clemens by the then attorney-general of Michigan, Alexander J. Groesbeck. Lloyd Prevost, who was suspected of complicity in the murder, was called before the justice in the inquiry and questioned in regard to what he knew about the crime. He, upon the advice of his counsel, John A. Weeks, an able lawyer of Mt. Clemens, refused to answer any questions other than to give his name, on the ground that the answers might incriminate him. Afterward he was formally charged with the crime and upon the trial, took the stand in his own defense. The cross-examination by Alexander J. Groesbeck, based upon his refusal to answer questions in the John Doe inquiry, contributed more than anything else to his conviction.

The Michigan Supreme Court held upon appeal (People v. Prevost, 219 Mich. 233, 189 N. W. 92), two

judges dissenting, that the defendant after he had testified in his own behalf, could be cross-examined respecting his refusal to answer questions in the John Doe inquiry.

The facts in the Brown case, briefly stated, were as follows:

On the morning of December 24th, 1919, J. Stanley Brown was found dead in his Dodge sedan car, on the Drefahl road, just above Dead Man's curve, three miles west of Mount Clemens, Michigan. He was grasping the steering wheel, his right hand had fallen down, and his hat had blown off; blood from bullet wounds in his head had flowed through the floor of the car onto the snow and had congealed there and frozen. He died between the hours of ten and eleven o'clock the night previous, testimony before the coroner showed. His overcoat was buttoned just like that of a man sitting at the wheel driving. The other clothing was not disturbed. He had a diamond ring and three twenty-dollar banker's checks and two or three dollars in money on his person. The lights were burning on the car. Dr. Lenfesty who made the autopsy, found one bullet in the skull, nearly whole, and the other bullets flattened and broken up in fragments. The bullets were thirty-eight caliber. The thickness of the skull was unusually abnormal. There were powder marks on the back of the neck, showing the gun had been held very closely to him, probably within six to ten inches from the skull. There were four bullet holes through the neck, the first having disorganized the brain so that he would have been thereafter paralyzed as far as his nerve control was concerned. The automobile had been found in the early morning by witness Drefahl, who passed the point with some companions. He noticed some tracks around the telegraph pole and leading therefrom toward the machine and therefrom down the road as far as the

corner. They were made by one person. The weather that morning was very cold, freezing. Witness called attention of the coroner and sheriff to the tracks which were plain and distinct. A witness, Mittelstadt, passed the Brown car, standing on the Drefahl road, about eleven o'clock on the night of December 23rd.

Brown was twenty-six years old, subject to fits of epilepsy from childhood, and on account of his physical condition, was not employed much of the time. He had money left in trust by his father, approximately $100,000 held by the Detroit Trust Company and his income was $250 per month, a portion of the principal having been turned over to him on his twenty-fifth birthday, July 28th, 1919—approximately $12,000. Lloyd Prevost, the defendant, was twenty-four years old and resided in Mt. Clemens all his life; had been in the army at Battle Creek and honorably discharged July 22, 1919. Stanley's wife, Ruth, was first cousin to Lloyd. There were two children. Brown and respondent had been inseparable companions and had been rooming together at the Edison Hotel, Mt. Clemens, for about three weeks. The night of the murder, Brown spent the forepart of the evening after supper until about nine o'clock at the hotel with defendant. On direct examination at the trial, Prevost denied all knowledge of the crime or of the whereabouts of Brown after nine o'clock the night of the murder. He was cross-examined by Mr. Groesbeck, as follows:

Q. "You say there are no blood marks on those shoes?" (Prevost's shoes.)

A. "There is not."

Q. "When did you examine them to determine that fact?"

A. "We did not. I never examined them."

Q. "How do you know there are no blood marks on those shoes?"

A. "Because I am not guilty of this crime."

Q. "You never examined those shoes?"

A. "No. I never did."

Q. "So that you do not know what marks are on them?"

A. "No. I do not."

Q. "So, when you were asked the question as to whether or not there were any blood marks on those shoes you did not know from any examination of them, did you?"

A. "What do you mean?"

Q. "This is what I mean, you never examined them?"

A. "I never had the opportunity to."

Q. "You had the opportunity to on the 24th of December, did you not?"

A. "I did not."

Q. "Didn't you have them in your room?"

A. "Surely, they were in my room."

Q. "Didn't you wear them on the 24th of December?"

A. "Yes, I wore them on the 24th of December."

* * *

Q. "You were claiming and asserting to be a friend of Stanley Brown's, weren't you, on the night of December 30th, 1919, and now?"

A. "Why, I have always been."

Q. "Just answer the question. That is the claim that you were making at that time, wasn't it?"

A. "I have always been a friend of his."

Q. "And you claimed then and you claim now that you and he were the fastest and closest friends, didn't you?"

A. "We were."

Q. "Yes. You have asserted that here and you have continually asserted that from the time that Stanley Brown was killed, haven't you?"

A. "It is nothing but the truth."

Q. "Answer the question. Have you asserted it since that time?"

A. "I can only answer it in this way, it is nothing but the truth."

Q. "Nothing but the truth?"

A. "Yes."

Q. "Now then, that was your attitude when you got on the witness stand. You were sworn, weren't you?"

A. "When?"

Q. "On December 30th, 1919." (Date of the inquest.)

A. "Yes, sir."

Q. "And Stanley Brown had been killed only seven days before, your friend, hadn't he?"

A. "I don't know how many days before."

Q. "Don't you know when he was killed?"

A. "Why on December 24th."

Q. "He was killed when?"

A. "To my knowledge on December 24th."

* * *

Q. "So that we may have it clear so that you will understand it, when you got upon the stand here upon the 30th day of December, 1919, at 7:30 or 7:45 o'clock in the evening, at the inquest, over the body of Stanley Brown, whom you claimed was your friend, and after you were sworn, did you make this statement—

> 'I have been advised by my attorneys to decline to testify excepting in their presence. I request the presence here of my attorneys.'

Did you make that statement at that time?"

A. "I did from a paper that they gave me. I didn't know what my constitutional rights were at the time."

Q. "Then you did make this statement, did you not?"

A. "I certainly did."

Q. "Who gave you a paper?"

A. "My attorneys."

Q. "Which attorneys?"

A. "Mr. Laundhausen and Mr. Weeks."

Q. "And they were here in court at the time, were they not?"

A. "Yes, sir."

Q. "And as soon as you were sworn you said

'I have been advised by my attorneys to decline to testify excepting in their presence.'

They were here, weren't they?"

A. "I read it from a paper they gave me."

Q. "It doesn't make any difference whether you read it or not. They were here, weren't they?"

A. "Yes, they were here."

Q. "Yes, they were here.

'I request the presence here of my attorneys.'

They were sitting right before you, weren't they?"

A. "I didn't know what my constitutional rights were. They represented me and they could explain that matter to you."

Q. "You didn't know what your constitutional rights were?"

A. "No, sir, I did not."

Q. "Why did you, as the friend of Stanley Brown, need any constitutional rights?"

Mr. McNamara: "I object to that, if your honor please. They have no right to comment on that. This man was entirely within his legal rights in refusing to answer the questions under the statute."

THE COURT: "He don't need to answer that question."

MR. MCNAMARA: "Any comment here upon it is immaterial here, irrelevant and incompetent, any more than if he did not take the stand here in this case, they could not comment on it. It is not subject to comment. It is a right of the constitution which attaches to him."

Q. "It is not comment, it is a question."

MR. MCNAMARA: "I object to that parading, if your honor please, in this case. He has no more right to parade it in this case than he would have to parade the fact that he did not have to take the stand here himself. Your honor would be obliged to charge the jury that that could not militate against him and they could not take it into their consideration."

THE COURT: "I will take care of that when I get to it."

Exception for defendant.

MR. MCNAMARA: "I object to it for those reasons."

Q. "Now you say at that time, you did not know what your constitutional rights were?"

A. "I do."

Q. "Hadn't your lawyers told you previously to the time that you came here that under the constitution of the State of Michigan, that you could not be compelled to make any answer unless you wished?"

A. "They did not."

Q. "They did not?"

A. "No, sir; I had never been so advised before."

Q. "Had they not written out this statement

'I avail myself of my constitutional privilege and decline to testify on the ground that my answers might tend to incriminate me'?"

MR. MCNAMARA: "That is all subject to my objection."

THE COURT: "Answer the question."

Exception for defendant.

Q. "Hadn't that been written out for you; hadn't they written it out for you?"

A. "Why yes, they had written it out for me. The only thing I could do was read it. What did I know about the law?"

Q. "That is your position, is it?"

A. "Yes, sir."

Q. "Now then, you heard Mr. Weeks make the statement that I read here yesterday, did you not, at that time?"

A. "Why, I think so."

Q. "After listening to Mr. Weeks, this question was asked of you:

'Q. You live here in the city Mr. Prevost?

'A. I do.

'Q. You knew Stanley Brown?

'A. I did.

'Q. On the night of the 23rd of this month, did you see him?

'A. I will leave that to my attorneys to answer.'

"Did you make that answer in response to those questions?"

A. "I don't remember whether I did or not."

Q. "Well, substantially that?"

A. "Well, I don't know."

Q. "Will you say that you did not make it?"

A. "I might have made it, yes."

Q. "Did you say to the court and to the jury that you would let the attorneys talk for you?"

A. "That is what I had gotten the attorneys for."

Q. "On that question?"

A. "On which question?"

Q. "On the question as to where on the night of the 23rd of December, you saw Brown?"

A. "I did not."

Q. "Did you state, 'I will leave that to my attorney to answer'?"

A. "I don't recall whether I did or not; I might have."

Q. "Did you make any other answer to that question that you know of now?"

A. "I don't know."

Q. "If you did, you would remember it, would you not?"

A. "I might have; I was excited and everything over here; I don't remember what I did say."

Q. "You were excited?"

A. "Yes, sir."

Q. "On the question as to where on the night of the 23rd of December, you saw Brown?"

A. "I did not."

Q. "Did you state, 'I will leave that to my attorney to answer'?"

A. "I don't recall whether I did or not; I might have."

Q. "Did you make any other answer to that question that you know of?"

A. "I don't know."

Q. "If you did, you would remember it, would you not?"

A. "I might have; I was excited and everything over here; I don't remember what I did say."

Q. "You were excited?"

A. "Yes, sir."

Q. "Are you excited?"

A. "A little now."

Q. "Have you been excited ever since this murder?"

A. "Somewhat."

Q. "Somewhat more than usual?"

A. "Yes, sir."

* * *

Q. "Judge Sawn swore you?"

A. "Yes, sir."

Q. "And after you had been sworn, you were interrogated about your connection with this matter, weren't you, by me?"

A. "Yes, sir."

Q. "By me?"

A. "Yes, sir."

Q. "You came over here and you had on that blue overcoat that was over there at the tailor shop on the 24th of December, did you not?"

A. "I don't remember what I wore."

Q. "You were wearing it when you came over here, weren't you? You were not wearing that old coat?"

A. "Why, I think I was."

Q. "Yes. You know what coat I refer to, the chinchilla or blue, don't you? That was the only overcoat that you were wearing at that time, wasn't it?"

A. "Well, it might have been."

Q. "Don't you even remember that?"

A. "I do not. No, sir."

Q. "Just give me that overcoat, will you please, the blue one?"

(An overcoat was produced.)

Q. "Is that the overcoat that you wore at the time that you were before Judge Sawn?" (At the inquest.)

A. "Why, I think so."

Q. "Is that your overcoat?"

A. "Why, yes."

Q. "Is that the overcoat that you left over in the

tailor shop and that was there on the 24th day of December?''

A. ''Yes, sir.''

Q. ''It is the overcoat that you had over at the jail there?''

A. ''Yes, sir.''

Q. ''Now I will ask you after being sworn, if you were asked by me the following questions to refresh your recollection:

'Q. Your name is Lloyd Prevost?

'A. Yes.

'Q. You were born here in Mt. Clemens?

'A. Yes.

'Q. How old are you?

'A. Twenty-four.

'Q. You knew Stanley Brown, did you?

'A. I would rather talk to no one without a lawyer; I want them first.

'Q. What do you want of them?

'A. (No answer.)

'Q. What do you want of them, Lloyd? Do you mean if they were here you would talk?

'A. They will talk for me.

'Q. They will talk for you?

'A. Yes.'

''Were you asked those questions and did you make those replies?''

A. ''I could not swear to it. I might have.''

Q. ''Will you swear that you did not make them?''

A. ''I will not swear that I did or did not make them.''

Q. ''Do you remember my asking you those questions?''

A. ''Why, you might have asked them.''

Q. ——

"'Q. What will they say for you; the lawyers don't know anything about this matter, do they?

'A. (No answer.)

'Q. You say that you refuse to state whether you knew Stanley Brown?

'A. (No answer.)

'Q. How long had you known him?

'A. (No answer.)

'Q. Did your lawyers tell you that?

'A. (No answer.)

'Q. I will tell you what your rights are. Your rights are you do not have to answer any questions that tend to incriminate you as the murderer of Stanley Brown. You don't have to give any answers here that I will ask you about that murder unless you see fit to do it.'"

A. "Just a minute."

Q. ——

"'Q. You are privileged to claim your rights under the constitution on the ground that any answer you might give might tend to incriminate you. Those are your rights. The fact that you knew Stanley Brown would not incriminate you. Do you refuse to answer that?'

"Now then, what were you going to say?"

A. "You never explained to me what my rights were; you told me I could not stand on my constitutional rights."

Q. "Now at the time you mean to say that I told you that you could not stand on your constitutional rights?"

A. "You certainly did and told me there was no law that I could."

Q. "Now at the time that this examination was held, Mr. Taylor was present taking down what you and I both said?"

A. "Yes, sir."
Q. "Mr. Nunneley was there?"
A. "I think so."
Q. "Mr. Johnston?"
A. "Yes, sir."
Q. "Mr. Sweeney of my office at Lansing was there?"
A. "He might have been."
Q. "The sheriff was there?"
A. "Not the first time."
Q. "The deputy sheriff was there, Torrey?"
A. "He might have been there."
Q. "Who else, if you recall, was present?"
A. "I don't recall."
Q. "Did I not state to you just exactly as I have read it here?"
A. "No, sir, you did not."
Q. "And after stating to you what your rights were, namely, that you had a right to refuse to answer any question that might tend to incriminate you in the murder of Stanley Brown; did I not ask you to state whether you knew Stanley Brown?"
A. "You never explained my rights to me."
Q. "You sit on that stand here this morning under oath and testify to that, do you?"
A. "Yes, sir."
Q. "That is just as true as the rest of your testimony."
Mr. McNamara: "Just a minute. I object to it as not a proper question."
Exception for the defendant.
Q. "The next question was:
'Q. Do you refuse to say?
'A. I want my lawyer. That is what I want.
'Q. That you want them here?
'A. Yes, I do.

'Q. And you want them to talk for you?
'A. I want them here.
'Q. Will you talk if they do come here?
'A. I will talk through them.
'Q. Through them?
'A. Yes.
'Q. So that you refuse to state whether you knew Stanley Brown unless they are here and then if they are here, the only answer you will make will be through them; is that what I understand your position to be: Is that your position?
'A. You know what I told you and I speak pretty good English and you get them and it will be a different song and before that you will not hear anything out of me.'

"Did you make those answers to those questions?"

A. "I might have."

Q. "Can't recall whether you did or not?"

A. "No, sir. I don't because there was a difference of two or three days I think between that testimony."

Q. "Will you say that you did not make those answers?"

A. "I made some of them but I did not make all of them."

Q. "Which ones did you not make?"

A. "About the constitutional rights."

Q. "You said that you did not say anything about constitutional rights; I had not read anything that you said about the constitutional rights? I read to you what I said."

A. "You claim that you called my attention to my constitutional rights?"

Q. "You had not said anything in all these answers I have read of yours about any constitutional rights, have you?"

A. "I called your attention——"

THE COURT: "Answer the question."

A. "I can not answer the question that way."

Q. "That is a very plain question; is there anything in it that I have read to you as far as your answer is concerned, where you said anything about your constitutional rights that you know of; you can answer that?"

A. "I called your attention to that when I first came in the office——"

Q. "Please answer the question?"

A. "I can not answer the question."

Q. "All right. We will go along—

'Q. What do you mean, a different song?

'A. (No answer.)

'Q. Do you mean that they would say something different from what you are saying?

'A. (No answer.)

'Q. Do you mean that they would say something different from what you are saying?

'A. (No answer.)

'Q. Where did you last see Stanley Brown alive?

'A. (No answer.)' "

MR. MCNAMARA: "All of this I object to as incompetent, immaterial and irrelevant in this case."

THE COURT: "It may be received subject to the objection."

Exception for the defendant.

Q. ——

" 'Q. Where did you last see him alive?

'A. (No answer.)

'Q. Can't you tell us that?

'A. (No answer.)

'Q. What time of the night was it that you saw him alive on the night of December 23rd?

'A. (No answer.)

'Q. You know, don't you when you saw him last?

'A. (No answer.)

'Q. Can't you tell us that?

'A. (No answer.)

'Q. What time of the night was it that you saw him alive on the night of December 23rd?

'A. (No answer.)

'Q. You know, don't you when you saw him last?

'A. (No answer.)

'Q. Can't you tell us that?

'A. (No answer.)

'Q. What time did you get in his automobile with him over here at the Edison Hotel?

'A. (No answer.)

'Q. You got in his automobile over there with him? And what time was it?

'A. (No answer.)

'Q. Where did you drive from there after you left the hotel out near Dead Man's Curve?

'A. (No answer.)

'Q. What time did you leave the hotel; will you tell us that?

'A. (No answer.)

'Q. What time was it that you had the conversation with Brown and the janitor there at the hotel and the janitor was standing in the doorway and you were outside and Brown was in the car?

'A. (No answer.)

'Q. Wasn't that about 10:30 or quarter of eleven that night, December 23rd?

'A. (No answer.)

'Q. You don't want to answer any of these questions; is that it; that is your position?

'A. (No answer.)

'Q. Your position is that you will not answer any of these questions?

'A. (No answer.)

'Q. Do you know Mr. Carter; you saw him going out of the room here, you know him?

'A. (No answer.)'

"Is that correct account of what took place there when you were first called before Judge Sawn?"

A. "I could not say it is or it is not."

Q. "Do you remember Mr. Carter leaving the room before you came in?"

A. "I remember one day that he did."

Q. ——

"'Q. You can refuse to answer these questions on the ground that they might tend to incriminate you with reference to the murder of Stanley Brown, but you can not refuse to answer them unless you claim that they will incriminate you; if that is your position.

'A. It certainly is.'

"Do you remember that question and answer?"

A. "No, sir, I don't."

Q. "What?"

A. "No, sir, I don't."

Q. ——

"'Q. The position that you take, the answering of these questions, will tend to incriminate you with the murder of Mr. Brown, is that right?'"

Mr. McNamara: "I object to that, if you honor please, as being not only incompetent and immaterial but highly prejudicial in this case. The only purpose of which the testimony is received is for that purpose."

Exception for defendant.

Q. ——

"'A. (No answer.)

'Q. Do I understand you correctly?

'A. It certainly is.'

"Do you remember that?"

A. "What was the last question again?"

Q. "I will go back so that you will have it in mind. The first question is—

'Q. The position that you make, the answering of these questions will tend to incriminate you in the murder of Mr. Brown, is that right?

'A. (No answer.)

'Q. Do I understand you correctly?

'A. It certainly is.'

"Were those questions asked you and did you make that one answer?"

A. "I could not say as to whether they were or whether they were not."

Q. ——

"'Q. So I want to be perfectly fair with you, Mr. Prevost. You have the right when any question is asked you in this room that you think will tend to incriminate you with reference to that murder, and to say so and to say that you will not answer the questions, but you have no right to refuse to answer unless they do tend to incriminate you and as to that you are the judge and we are not. I think I have explained to you all of your constitutional rights. As I understand your position you refuse to tell us, first, what time it was that you last saw Stanley Brown alive; is that right?

'A. (No answer.)

"Did I make that statement to you?"

A. "I don't think you made all of those statements to me."

Q. "Did I make that statement to you? Did I or did I not?"

A. "The last statement?"

Q. "Yes?"

A. "I don't think you did."

Q. "Will you say that I did not?"

A. "Yes, sir."

Q. "You swear to that, do you?"

A. "Yes, sir, I will."

Q. "Although there were five or six people in the room and what you were saying was being taken down stenographically?"

A. "Yes, sir."

Q. "That don't make any difference to you?"

A. "No, sir."

Q. ——

"'Q. On the ground that it might tend to incriminate you?

'A. (No answer.)

'Q. Is that correct?

'A. (No answer.)

'Q. That is your position, Mr. Prevost, is it?

'A. (No answer.)

'Q. That is your position?

'A. Yes.'

"Did you make that answer to those questions?"

A. "I could not say as to whether I did or whether I did not."

Q. "Will you deny that you made that answer?"

A. "What is that?"

Q. "Do you deny that you made that answer?"

A. "Why, I can not say whether I did or whether I didn't."

Q. ——

"'Q. You also refuse to say what time it was that you were over at the Edison with Brown on the night of December 23rd, in conversation with him and the janitor of the hotel, for the same reason; that is your position?

'A. (No answer.)

'Q. That is your position that you will not answer that question or say anything about it on the ground it might tend to incriminate you, is that right?

'A. (No answer.)

'Q. That is your position and you refuse to answer for that reason?

'A. (No answer.)

'Q. That's the reason you assign for not answering the question?

'A. (No answer.)

'Q. That is it, isn't it, Lloyd?

'A. (No answer.)

'Q. There isn't anything unfair about the question, you know where you were on the 23rd day of December, and on the night of the 23rd of December?

'A. (No answer.)

'Q. Do you refuse to answer?

'A. Go and get my lawyers and they will give you all the answers you want.'

"Did I ask you those questions and did you make that answer?"

A. "I would not say whether I did or not."

Q. "Will you say that you didn't."

A. "I will to some of those questions."

Q. "Well, there are a great many of them that you made no answer to at all; that is a fact, isn't it?"

A. "A good many I made answer to but you have that I didn't answer."

Q. "I have not made this record. This was made by Mr. Taylor. I am not a stenographer. You saw Mr. Taylor taking down what you were saying there, did you not, did you or didn't you?"

A. "Why, I think I seen him."

Q. "You knew who he was, didn't you, at that time?"

A. "Why, I didn't know who he was, no, sir."

Q. "You knew he was the court stenographer?"

A. "I didn't, no sir."

Q. "You know who he is now?"

A. "I know who he is now, yes, sir."

Q. "You had never seen him before in your life?"

A. "Yes, I did see him before."

Q. "For how long a period had you been seeing him?"

A. "Why I don't think I had seen him probably in two years."

Q. "You knew when you first met him what he was doing or what his business was?"

A. "He was secretary of the race track."

Q. "Outside of that anything?"

A. "No, sir."

Q. "You didn't know that he was a stenographer?"

A. "No, sir."

Q. "The next question was:

'Q. Who?

'A. Lungerhausen, Weeks & Lungerhausen.

'Q. They were not with you on the night of December 23rd, were they? They were not with you at that time, were they, there at the Edison Hotel?

'A. (No answer.)

'Q. They don't know anything about that?

'A. (No answer.)

'Q. How can they answer that question?

'A. (No answer.)

'Q. You don't for a moment claim that they could tell us what time you and Stanley Brown left the Edison Hotel on the night of December 23rd; you don't claim that; they were not there, were they?

'A. (No answer.)' ''

MR. MCNAMARA: "I object to that, if your honor please. He has already told them that he would not answer without his lawyers and that should be sufficient."

THE COURT: "I think we have read a portion of the statement and—

Exception for defendant.

MR. MCNAMARA: "He could go on indefinitely with those questions."

Q. "This witness has sworn that he was not advised of his rights and had no knowledge of—"

MR. MCNAMARA: "He was advised by his attorney of his rights, your honor."

Q. "Just a minute. I am going to show from this record that this witness was absolutely falsifying when he made that statement."

THE COURT: "You may proceed, subject to the objection."

Q. "As attacking his credibility and his truthfulness in this case."

MR. MCNAMARA: "I take an exception. I want an exception to the remarks of the attorney-general also in the presence of the jury."

Exception for defendant.

Q. ——

" 'Q. Do you refuse to answer that as to whether they were there?

'A. (No answer.)

'Q. Why do you tell us that Lungerhausen & Weeks, or any other lawyers could answer a question of that kind? They don't know anything about it, do they?

'A. (No answer.)

'Q. Your position is that you refuse to answer that or any other questions on the ground that it might tend to incriminate you because of your constitutional privilege; they have told you that they had that privilege haven't they?

'A. (No answer.)

'Q. Lungerhausen & Weeks have told you that you need not answer any question that would tend to incriminate you?

'A. (No answer.)

'Q. I also told you and reiterate it and I want to know if you refuse to answer the questions on those grounds or not, and if you don't we will have to take some means to find out whether you have the privilege of refusing?

'A. (No answer.)

'Q. If you tell me that you refuse to answer these questions standing on your constitutional rights I will accept that as an answer; is that your reason?

'A. It certainly is. I have told you three times?'

"Did you make those answers to those questions?"

A. "Yes, sir."

Q. ——

" 'Q. In answer to each one of these questions I have asked?

'A. Yes.

'Q. Is this coat yours? You don't need to answer it if you think it will incriminate you in any

way; you have the right to refuse to answer it on the ground that it would tend to incriminate you; is that your coat, I am now speaking about an overcoat?

'A. (No answer.)

Mr. McNamara: "I object to this, if your honor please. It appears in the testimony in this case at this time, read by the attorney-general, that he told him he was availing himself of his constitutional rights. That certainly must have come from Mr. Groesbeck at that time when he told it to him. Further questioning along that line, if your honor please, is simply parading here, prejudicial to the rights of this defendant before this jury. It is incompetent, irrelevant and immaterial in this case."

Q. "I am bringing out the facts in this case."

The Court: "The testimony may be taken subject to the objection."

Exception for the defendant.

Q. "Which it is my duty to do and I am going to do it."

Mr. Hosner: "Oh—"

Q. "I had this coat in my hands when you were here in the witness room, didn't I?"

A. "I could not say as to whether you did or whether you did not."

Q. "You saw me have an overcoat of yours there, did you not?"

A. "Why, you had two of them, I think."

Q. "Well, you saw this one, didn't you?"

A. "I don't think I did."

Q. "You testify now that you did not?"

A. "I think you showed me my army coat."

Q. "Yes, and I showed you this coat too, didn't I?"

A. "No, sir."

Q. "I also had a green undercoat of yours there, didn't I?"

A. "I don't remember whether you did or not."

Q. "Bring that in. Now with reference to the overcoat, I asked you this question:

'Q. Do you refuse to tell us whether that is your coat or not?

'A. I certainly do.' "

Q. "Then I showed you the green overcoat and asked you this question:

'Q. Do you refuse to tell us this green overcoat is yours?

'A. I certainly do.'

"You made those answers to those questions?"

A. "I could not say as to whether I did or whether I did not."

Q. ——

" 'Q. Whether this knitted cap is yours with the green tassle and green rim and brown body, and whether this other cap, this dark cap with the peak on is yours?

'A. I certainly do.

'Q. On December 23rd, the night of this murder when Brown was shot four times with a thirty-eight caliber revolver out near Dead Man's Curve in an automobile designated as a Dodge sedan, what kind of shoes were you wearing.'

"Do you remember me asking you that question?"

Mr. McNamara: "This is all subject to my objection, if your honor please."

The Court: "Yes."

Exception for defendant.

A. "You asked me if I was out at Dead Man's Curve. You didn't ask me what shoes I was wearing."

Q. "Just a minute. Do you remember me asking you the question what kind of shoes you were wearing?"

A. "You never asked me what kind of shoes I was wearing at that time."

Q. "And your answer was—

'A. My lawyers can tell you that.'

"Do you remember that?"

A. "No, sir."

Q. ——

"'Q. Black or brown?

'A. The lawyers can tell you that.

'Q. You say the lawyers can tell me that?

'A. Yes.'

"Did you make those answers?"

A. "I could not say as to whether I did or whether I did not, to all of them."

Q. "They sound pretty familiar to you, don't they?"

A. "All except that part there where you said you asked me what shoes I was wearing on that night."

Q. "I did ask you that, didn't I?"

A. "No, sir, you did not."

Q. "I showed you these shoes here?"

A. "You did not."

Q. "And you refused to tell me?"

A. "You did not. You did not show me those shoes."

Q. "Those were your shoes, weren't they?"

A. "Yes, my shoes, yes, but you did not show them to me."

Q. "These were your shoes. Now I am going to ask you whether you wore those shoes on the night of December 23rd and you answer that now, will you. Did you wear these shoes on the night of December 23rd, 1919?"

A. "I certainly did."

Q. "Yes; and you did not wear any other shoes that night did you?"

A. "I don't think I did."

Q. "Well, then you did not wear any other shoes except those black ones?"

A. "I don't think I did."

Q. "You know that you did not wear any other shoes except those, don't you?"

A. "No, sir, I do not."

Q. "Do you mean to sit there and tell this jury that you don't know whether these were the shoes you wore that night?"

A. "You asked me if I wore any other shoes besides those."

Q. "Just answer the question."

Mr. McNamara: "He has answered the question and told him that he did wear shoes."

Mr. Hosner: "That was his answer Saturday, too."

Q. "Didn't you state here Saturday, in answer to Mr. Weeks that these were the shoes you were wearing that night?"

A. "I think I did, yes, sir."

Q. "Don't you remember whether you did?"

A. "Yes."

Q. "Yes. Do you remember now whether you wore these shoes on all of the night of December 23rd or not, while you had shoes on?"

A. "I could not say as to whether I wore them all the time or not."

Q. "You can't remember that?"

A. "No, sir."

Q. "Can't remember a thing about it?"

A. "I might have worn them."

Q. "You might have?"

A. "Yes."

Q. "You did wear them didn't you?"

A. "Why yes."

Q. "Yes and you had them on all that evening, did you not until you took them off?"

A. "Yes."

Q. "Yes, and you did not wear any other shoes excepting these that night that you know of?"

A. "I don't remember whether I did or not."

Q. "You did not wear any that you know of now, as you sit on that stand, did you?"

A. "I don't remember whether I did or not."

Q. "Can't remember a thing about it?"

A. "No, not since December 23rd."

Q. "Not since December 23rd."

A. "No, sir."

Q. "Well, you know what shoes you had on on December 23rd, don't you?"

A. "I answered that question about six times now, that I wore those shoes on December 23rd; that ought to be sufficient hadn't it?"

Q. "You didn't wear any other that you know of?"

A. "I don't know whether I did or not."

Mr. Groesbeck: "Now, I will just read it to complete the record."

Mr. McNamara: "The same objection to the completion of this record."

Mr. Groesbeck: "When a witness goes upon the stand he has waived any constitutional rights he might have; that is, he can not refuse to answer questions and I have the right or anybody interrogating him has the right to interrogate him as any other witness; that is the law of the state. When counsel says I have an ulterior purpose in this case or examination except to bring out facts, he is stating something he knows nothing about

and it is not a fact or the truth. I wish to proceed with the examination of the witness.

Mr. McNamara: "The record speaks for itself and he has already informed him according to that record that he was standing on his constitutional rights and what is the purpose of reading these questions when he already knows that he was standing on his constitutional rights."

The Court: "Testimony may be taken subject to the objection."

Exception for defendant.

Mr. Groesbeck: "Now, then, you testified here this morning that you do not remember what you were interrogated in this gun incident over at the Edison Hotel by me?"

A. "I could not swear now as to whether I was or was not; I might have been and I might not have been."

Q. "Now, witness, isn't it a fact that after Stanley Prevost and Joe Abrecht and Walter Selk had been subpoenaed and had given testimony before Judge Sawn, that you were called in before Judge Sawn the second time and at that time told by me what Stanley had testified to and substantially as I have stated, and were you not then and there asked by me for any explanation that you might make; answer it yes or no?"

A. "You said a second time; I think I had been there before you about five times."

Q. "You may be right on that; I may be mistaken about the second time; but that does not make any difference whether it was the second or third time; I will not quibble about that; either at the second or the third time, we will not quibble about the matter; you possibly may have been there, but I will find out in a minute. I think it was the second time and I will give you the date of it very shortly."

A. "I could not swear; you say that it is the second time; I know it is not the second time."

Q. "I don't wish to quibble whether the second or third time, but at the time when you were called by me, did I tell you that your nephew Stanley Prevost had been there and given certain testimony about the gun?"

A. "Why, I don't remember whether you did or not."

Q. "You have not any recollection about it at all?"

A. "No, sir."

Q. "One way or the other?"

A. "No, sir."

Q. "Well, see if I did not. You were called back at 7:55 P. M. and I will fix the date a little later and I will read this and see if it is according to your recollection.

'Q. Mr. Prevost, when you were here the other night, I told you what your constitutional rights and privileges were, is that right?

'A. Yes.'

"Did you make that answer to that question?"

A. "I did not."

Q. "If you made that answer to that question it was untrue?"

A. "You never called my attention to my constitutional rights.

'Q. For the purpose of explaining why you were called back here tonight, I am going to tell you that you don't need to answer any questions that are put to you about this investigation or about the murder of Mr. Brown if you think those answers will in any way incriminate you; that you also have a perfect right under the constitution to refuse to answer if you do think that they incriminate you?

'A. One question, why can't I have my lawyers present or my attorneys?

'Q. This is an investigation provided for under the law and it is not permissible that your attorney should be here, simply at your request.

'A. I have requested them to be here.

'Q. Now, I want to state to you so that you will understand the situation thoroughly before you make any answers.

'A. Well, I will not answer any questions not unless attorneys are present.

'Q. Well, the only thing that we are interested in is ascertaining who it was that killed Stanley Brown on the night of December 23rd, and we do not wish to charge you with that offense until you have been given an opportunity to answer some questions that we desire to ask you, and before asking those questions I am going to state to you that your nephew, Stanley Prevost, has appeared here during the afternoon and has given certain testimony with reference to this case and along these lines—that he and a young man named Obrecht went to your home at the Edison Hotel on the evening of December 21st, which was on a Sunday and met you in your room at that time. That he first went into the room and his friend remained outside in the hall; that you there gave him a revolver—

'A. I did not.' ''

A. "I did not make that answer; I did not."

Q. "Was that question put to you at that time by me as I have read it?"

A. "That question was put to me and I told you at the time that he had been there and that he had given me a revolver and that he had brought it back to me."

Q. "You say that that question was put to you?"

A. "Yes, sir."

Q. "And so if the stenographer transcribed his notes and has your answer to that question as 'I did not,' then he put something down there that you did not say?"

A. "He certainly did."

Q. "Now you want this jury to understand that you went on and told us what?"

A. "I told you—you asked me that question and I told you that he had been there on Sunday evening and that I had given him a revolver and that he returned a revolver to me."

Q. "Now, you have stated all that you want to say about it?"

A. "Yes, I have."

Q. "The sheriff was there that night?"

A. "The sheriff was not there at that time."

Q. "You remember that clearly?"

A. "Yes, sir; I did.

Q. "Now the next question was this and see if you remember it:

> 'Q. And that you requested him to get for you some cartridges. Obrecht says at that time he was present and saw you give to your nephew, Stanley Prevost, a revolver and that the revolver was taken by Stanley and they went down to Obrecht's house where Stanley left Obrecht and from there over to his house and that after supper he went down in the basement or cellar and got some cartridges and placed them in his pocket and that he, Obrecht, after supper went to Stanley's house and he, and Obrecht came back to the Edison Hotel and that Stanley there gave you this same revolver that you had given him and also the cartridges which he obtained out of a chest in his father's cellar. That at the time you gave him that revolver you asked him not to

say anything to anybody about it and they left your room about seven o'clock that night. Did he bring that revolver to you?

'A. What caliber was it?'

"Was that question asked you and did you make that answer?"

A. "I could not say as to whether I did or not."

Q. "Was that question asked you first?"

A. "Well, it might have been."

Q. "Was it or was it not?"

A. "I could not say whether it was or not."

Q. "It was a fair question?"

Mr. McNamara: "I object to that; the question speaks for itself, your honor, whether it is fair or unfair."

Q. "Did I tell you at that time that according to the best of your recollection that Stanley Prevost had been there before Judge Sawn, and what he testified to with reference to the revolver and also that Joe Obrecht was with him and that they had gone up to Stanley's house and he had gone down in his cellar and got some cartridges and put them in his pocket and came back and he met Joe over at his house and they went up to the hotel and there delivered that revolver to you; did I tell you all of that?"

A. "I think you did."

Q. "Just as I have read it here."

A. "I couldn't say the way that you read it there."

Q. "Substantially that way?"

A. "You might have said it in a different way."

Q. "I mean the words were the same?"

A. "They don't seem to have the same expression that you used."

Q. "What do you mean by the same expression?"

A. "You did not use that kind of voice."

Q. "You mean my voice was different?"

A. "Yes, sir."

Q. "As a matter of fact, I was talking lower than I am now."

A. "No, you were not talking low but a very loud tone of voice."

Q. "Yelling at you?"

A. "Yes, sir; just stood there within a foot of me."

Q. "Just yelling at you?"

A. "Yes, sir."

Q. "Scaring you?"

A. "Yes, sir."

Q. "You were frightened?"

A. "Yes, sir."

Q. "Frightened to death?"

A. "Yes, sir, I was."

Q. "Consequently you can not recall whether I asked you these questions or not?"

A. "I can recall some of them."

Q. "Do you recall these last two I have read to you."

A. "You will have to read them over again."

Q. "Do you want me to read them?"

A. "Yes sir."

Mr. Hosner: "He said that they were substantially correct."

Mr. Groesbeck: "May I go on with this examination."

The Court: "You may proceed."

Mr. Hosner: "He has said substantially the same as he has read it."

Mr. Groesbeck: "I don't think I will take the time to re-read these questions, witness. Do you really want me to read those two questions over again?"

A. "I certainly do."

Q. ——

"'Q. Well, the only thing that we are interested in is ascertaining who it was that killed Stanley Brown on the night of December 23rd and we do not wish to charge you with that offense unless and until you have been given an opportunity to answer some questions that we desire to ask you and before asking those questions I am going to state to you that your nephew, Stanley Prevost, has appeared here during the afternoon and has given certain testimony with reference to this case and along these lines—that he and a young man named Obrecht went to your room in the Edison Hotel on the evening of December 21st, which was on a Sunday and met you in your room at that time. That he first went into the room and his friend remained outside of the hall; that you there gave him a revolver.'

"Do you remember that question?"

A. "The first question that you read there. I don't remember any such a thing but I do remember about the last question.

Q. "And your answer as recorded here is

'I did not.'

"The next question:

'Q. And that you requested him to get for you some cartridges. Obrecht says at that time he was present and saw you give to your nephew Stanley Prevost a revolver, and that the revolver was taken by Stanley and they went down to Obrecht's house where Stanley left Obrecht and from there over to his house and after supper that he went down in the basement or cellar and got some cartridges and placed them in his pocket and he, Obrecht, after supper went to Stanley's house

and he and Obrecht came back to the Edison Hotel and that Stanley there gave you this same revolver that you had given him and also the cartridges which he obtained out of a chest in his father's cellar. That at the time you gave him that revolver, you asked him not to say anything to anybody about it, and they left the room about seven o'clock that night; did he bring that revolver to you?

(And your answer was)

'A. What caliber was it.'

"Do you remember that question and answer?"

A. "Yes, I remember it."

Q. "Did you make that answer?"

A. "Yes, sir, I did."

Q. "Now.

'Q. He don't know what he said that you told him or made some remark that it was a 32; it doesn't make any particular difference what caliber it was—did he bring any revolver?

'A. I object to any questions at all without the presence of my lawyer.'

"Do you remember that question and answer?"

A. "Why, I think so."

Q. "It is just as I read it, is that right?"

A. "It might be."

Q. "It might be?"

A. "Yes, sir."

Q. "You don't know whether it was or not?"

A. "No, sir."

Q. ——

"'Q. Well under the law, you can refuse on the ground that the answer to those questions might incriminate you and that you would have a

perfect right, under the constitution to refuse to answer on that ground?

'A. I certainly do on any question whatsoever you might ask me.

'Q. Now Lloyd, that is your first name?

'A. Yes.

'Q. If you have any explanation to give to the officials of your conduct, with reference to your conversation with Stanley Prevost and this other young gentleman I have named, you have a perfect right to make it now.

'A. (No answer.)

'Q. I will frankly say to you that this is a serious situation and if there is anything that you can say which will explain that conduct on your part, I would be very glad to hear it.

'A. (No answer.)

'Q. If there is any explanation you wish to make in any way?

'A. No explanation whatsoever.'

"Were you asked those questions and did you make those answers as I have read?"

A. "I might have been asked them."

Q. "Did you say in answer to this question

'Q. If there is any explanation that you wish to make in any way?

'A. No explanation whatsoever.' "

A. "I could not answer that question."

Q. "Did you answer it?"

A. "I could not say whether I did or did not."

Q. "Will you say that you did not say that?"

A. "I can not say whether I did or did not."

Q. "Now, then, isn't it a fact that you then asked as you have repeatedly stated for your lawyers, and I asked you this question

'Q. Will you tell us if your lawyers are present?

'A. Certainly.

'Q. Tell us where the revolver is?

'A. That is for the lawyers.

'Q. If we ask Mr. Weeks to come here?

'A. Get my lawyers present and I will find out. If he says it is all right for me to tell you about it, I will tell you the whole thing.

'Mr. Nunneley: Is Mr. Weeks the one that you want?

'A. I think so.

'Q. Do you remember that you sent for Mr. Weeks?

'A. There is some question there and answer that you have down there.

'Q. Just answer the question.

'A. I would like to answer that for you.

'Q. Now the question was, we sent for Mr. Weeks to be here; you know that we sent for him and he came there and he had a talk with you right there?

'A. I think you did; why yes, he was up there.

'Q. Now is this what I stated to Mr. Weeks, in your presence?' "

Exception for defendant.

" 'We sent for Mr. Prevost a short time ago and I stated to him what his constitutional rights were to the effect that he was not required to answer any question that might be put to him tending to in any way incriminate him. He made the request that you be present as one of his attorneys and for your information the matter I was asking him about was this: "Information has come to us that on the Sunday before the murder

of Stanley Brown, that Mr. Prevost over at the Edison Hotel met his nephew, Stanley Prevost and another young man by the name of Obrecht. That in his room at the Edison Hotel he gave to Stanley Prevost a revolver which Stanley took with him to his home; Obrecht accompanying him as far as Obrecht's house with the understanding that they were to meet after supper. That Stanley at that time had on his leather coat and that this revolver was placed in the outside coat pocket. That Lloyd Prevost requested Stanley at that time to keep the fact of the giving of the revolver to him mum and not tell anybody and also requested him to get some cartridges at his father's house, and Stanley went home and got the cartridges down in the cellar out of a chest and put them in an overcoat pocket which was not the leather coat but what he called his good overcoat and transferred the revolver from the leather coat into the other coat he was wearing and he and Obrecht went back to the Edison Hotel and he delivered to Lloyd Prevost this revolver and these cartridges and I have asked Lloyd Prevost whether or not he had any explanation to make regarding that matter and as to where that revolver is at the present time. He has stated in answer to that question that he wanted you present, and if you told him that he might answer he would tell his attitude." Now, that in substance is, a correct statement is it not, Lloyd?

'A. Yes.'

"Do you remember that?"

A. "I don't remember whether I said yes to it; I don't think I answered it."

Q. "Didn't I ask you if that was a correct statement?"

A. "I don't recall whether you did or not."

Q. "And then Mr. Weeks said:

'Well is that a correct statement of the testimony that has been submitted to you?

'MR. GROESBECK: Yes.'"

Q. "Do you remember what Mr. Weeks said?"

A. "No, I do not."

MR. GROESBECK: "Well, to refresh your recollection here is what he said:

'MR. WEEKS: My position is this—I don't like to stand in the way of helping in this matter in all its details, but this man is now the accused party and he is in prison on this charge and the order of proof requires the prosecution to make a full presentation of the facts on which they base their charge, and we are entitled to listen to the testimony presented by the prosecution and then answer it methodically and fully and for you to request the accused party to take the stand and submit to a rigid cross-examination without permitting him to hear the testimony against him, is changing the order of proof and you putting the defendant on the stand and make him disclose his defense, not knowing what the case is against him is clearly contrary to his constitutional rights which require the witnesses to meet him face to face and make their statements and then permit him to attend with counsel and prepare his defense in a methodical way.

'MR. GROESBECK: You don't mean all of that statement?

'MR. WEEKS: Yes.

'MR. GROESBECK: Do you mean that it is

against his constitutional rights to ask him these questions with full information on his part as I have advised him that he does not need to answer them if they tend to incriminate him? If that were true, it would be absolutely unlawful for any officers of the law to ask a man accused of crime any questions. You don't mean to put it that way?

'Mr. Weeks: You have the right to ask any number of questions.

'Mr. Groesbeck: He has the right to refuse to answer on what ground?

'Mr. Weeks: That he avails himself of his constitutional rights, that the answers might tend to incriminate him and an inquest of this kind has the effect of entirely changing the order of proof as if you extract from him his defense in advance of the prosecution, you change the order of proof in depriving him of substantial legal rights.' ''

Q. "Do you remember all of that?"

A. "I might and I might not."

Q. "In answer to that I stated:

'We are not asking him for anything about his defense. Mr. Prevost is not charged with the murder of Stanley Brown at this time. For the purpose of giving him an opportunity before any such charge is made to explain this feature of the case which I have called your attention to, we called him in here and at his request we have asked you to come here and advise him whichever way you wish to and if it is your position, if he wants to know it whether or not you will allow him to answer that question and if not on what grounds. Of course, I understand that it is up to him. He

must make the refusal and must state on what grounds.'

"Do you remember that?"

A. "I might and I might not."

Q. "You don't remember anything about that?"

A. "I remember a little about it."

Q. "And following that, and I am sorry to be obliged to read it all to refresh your recollection, because it takes so much time.

'MR. WEEKS: Well you have stated one element of the prosecution's case and one of the material links in the chain of circumstances which you are seeking to weave and you are asking that it may be piece-meal.

'MR. GROESBECK: No, I am not asking it whether it is so or not.

'MR. WEEKS: I can not consent to my client being permitted to answer any questions material to this charge of murder.

'MR. GROESBECK: On what grounds?

'MR. WEEKS: On the ground that it might tend to incriminate him. Another question material to the issue now before this court would be possibly a vital fact in a chain of circumstances and I know nothing about the other circumstances in the case, and it places me in a peculiar disadvantage in stating some facts and asking us to answer that without knowing what relation it bears to the other material facts. I don't know what your other links are in the chain.

'MR. GROESBECK: You know that Stanley Brown was murdered? You know that this investigation is for the purpose of ascertaining who murdered him?

'MR. WEEKS: Yes, I understand the purpose is to change the order of proof.

'MR. GROESBECK: No, nothing of the kind.

'MR. WEEKS: And get the defendant's testimony on the record in advance.

'MR. GROESBECK: I don't wish to argue that.' "

MR. HOSNER: "What is the purpose of reading that? I would like to ask what is the purpose of reading all this stuff into this record?"

MR. GROESBECK: "To contradict what this witness has sworn to in this case."

MR. HOSNER: "This witness could not remember all that he said and what Mr. John Weeks said at that time. What of it if he did? There would not be one attorney out of a dozen understand what you were getting at."

Exception for defendant.

THE COURT: "You may proceed."

MR. GROESBECK (reading):

" 'I don't wish to argue that on the facts now. And there is no question about the order of proof. I merely asked Mr. Prevost and I say it to him again, in your presence, before any of the officers of the law laid such a serious charge against him, or any other man, namely, that of murdering a fellow human being, and a matter of this kind comes up that it is at least only fair to ask him if he has any explanation to make of it and I think we have gone to a great length when we have called you in as his counsel and at his request and informed you of the question we are going to ask and that question is whether or not he has any explanation at this time to make regarding that revolver and where it is at the present time. Now, if he was in possession of that revolver on that Sunday he knows where it went. I don't and pos-

sibly you don't. He knows where it is today. He may be the only person that does know where it is. He can say that he refuses to answer on the ground that it might tend to incriminate him and it has nothing to do with the order of proof. I don't wish to argue it any further. Now, will you please state to Mr. Prevost what you desire him to do.

'Mr. Weeks: I will advise him as I advise any man charged with a crime of this seriousness to decline to answer any questions material to this issue at this time for the reason his answers would tend to incriminate him. The stronger reason is that his answers now would be made a part of the prosecution's prima facie case. That is its purpose and its effect will be to change the order of proof.

'Mr. Groesbeck: For your information I might state to you he has already made several statements to the sheriff and prosecuting attorney.

'Mr. Prevost: About what?

'Mr. Groesbeck: About the possession of this particular revolver and this particular thing.' "

Q. "Do you remember that?"

A. "Well, I might and I might not. I can not recall all that."

Reading ——

" 'Mr. Weeks: Mr. Attorney-General, I appreciate your courtesy in the matter and I will say, however, as his counsel, after having carefully considered this proposition and having considered this proposition and having considered it for days, I have come to the unalterable conclusion

that I can not advise him otherwise than to refrain from answering any questions.' "

Q. "Do you remember that?"

A. "I do not, sir."

Q. "You don't remember a thing about it?"

A. "I don't remember the last part, no."

Q. "Will you say that any part of that did not occur?"

A. "I remember about two-thirds of it, yes."

Q. "You remember about two-thirds of it?"

A. "Yes."

Q. "The two-thirds that you do remember of it, I read it correctly?"

A. "Why, I couldn't say as to whether you did or not."

Q. "You remember it?"

A. "I haven't a typewritten statement of it."

Q. "You remember it substantially as I have read it to you?"

A. "Why it might be true and it might not. I don't know."

Q. "I didn't ask you that, witness. I ask you if you remembered it substantially as I have read it to you?"

A. "I answered that question once."

Q. "Well, I want the answer now?"

A. "Why I don't remember as to whether it is right or wrong."

Q. "You said that you remember two-thirds of it?"

A. "Yes."

Q. "The two-thirds of it that you do remember, did I read that correctly?"

A. "Why as far as my knowledge goes, yes."

Q. "And as to the other third, you won't say whether you remember it or not?"

A. "I couldn't say, no."

Q. "Now, did I understand you correctly this morning when you said that you were not asked by me about some of these matters, particularly about the shoes and the clothing that you wore that night?"

A. "What's that, Mr. Groesbeck?"

Q. "I will put it this way first; did I ask you at that hearing whether or not you and Stanley Brown left the Edison Hotel and drove out to Dead Man's Curve or past Dead Man's Curve at about 10:30; did I ask you that at that hearing?"

MR. MCNAMARA: "I object to that. This has all been gone over. He has read that question and then read the answer that he wouldn't answer or 'No answer.' It has all been gone over once, your honor, unless your honor wants it in the record again. I object to it."

Q. "Can he answer, your honor?"

THE COURT: "Yes; answer the question."

A. "Read the question over again."

(The question was read.)

MR. MCNAMARA: "I further object to it because he has already said he stood upon his constitutional rights and refused to answer the question, and was so advised by his attorney, Mr. Weeks."

MR. GROESBECK: "I have a right at any time to test his recollection on cross-examination?"

A. "I couldn't answer that question as to whether you did or whether you didn't."

Q. "Did I or did I not ask you whether you got in that car, that Dodge sedan with Stanley Brown about 10:30 over at the Edison Hotel and rode across the bridge, up Cass Avenue, out Cass Avenue, around Dead Man's Curve, and north after you turned that corner there to the east and west road. Didn't I ask you about it?"

A. "I couldn't say as to whether you did or whether you didn't."

Q. "You haven't any memory about it at all?"

A. "No."

Q. "Did I ask you at that time your purpose in going out there?"

A. "Why, I don't remember whether you did or not."

Q. "Did I ask you whether or not at that time after you got out there you killed Stanley Brown?"

A. "I don't remember whether or not you did or not, or whether you did not."

Q. "You can't remember whether I did or not?"

A. "No, sir."

Q. "I asked you that?"

A. "No, sir."

Q. "Did I ask you that question and did you answer it?"

A. "No, I did not answer it."

Q. "Don't you remember that that question was put right square up to you whether then and there on December 23rd, you did not in that automobile kill Stanley Brown, at about eleven o'clock, at night?"

A. "I don't think it was."

Q. "You don't think it was?"

A. "No."

Q. "Will you swear that it was not?"

A. "Yes, sir, I will."

Q. "You will swear that I did not ask you that question?"

A. "Yes, I will swear that you did not ask me that question."

Q. "All right."

Mr. Hosner: "If the court please, I think the time ought to be fixed and the place, whether it is the first, second or third or fourth or fifth hearing."

Q. "This is at the time—"

MR. MCNAMARA: "We have no means of knowing it if your honor please. We have no testimony to follow the reading of the attorney-general. We have nothing."

MR. HOSNER: "What is the date of the hearing?"

MR. MCNAMARA: "We have nothing of that kind in this case at all."

MR. HOSNER: "Don't you remember the date?"

Q. "He put down the date at the start and then the rest of it just shows the hours."

MR. HOSNER: "You were there."

Q. "I know it was between the 5th and the 10th of January; whether it was the 5th, 6th, 7th I can't recall. Well for your information it was on January 5, 1920."

MR. WEEKS: "We object to this further, your honor, because we are unable to know whether the attorney-general is reading the testimony correctly or whether he is reading all of the testimony. We object to this line of cross-examination for that reason."

THE COURT: "I will make the same ruling I did at first, that if the witness wants it all read, it may be read."

MR. MCNAMARA: "How are we to determine, if your honor please, whether it is all read or not. How is counsel to determine whether it is all read or not?"

MR. WEEKS: "Or whether it is correctly read?"

MR. GROESBECK: "It will be determined by the stenographer who took it. That is how we will determine it."

THE COURT: "I assumed that that would be the situation."

Q. "Now, I will have to correct my statement witness. This examination I refer to was on the 8th of January."

MR. HOSNER: "That was after he was arrested. What was the date of his arrest?"

MR. MCNAMARA: "On the 6th, I think."

Q. "That isn't right either. Strike that out of the record. It was on the fifth. I was correct before. Now you say that I did not ask you whether or not you saw Brown last night?"

A. "No, sir. You never asked me that.

Q. "All right. Did I ask you as follows:

'Q. Did you and Brown drive out near Dead Man's curve on the night of December 23rd?

'A. I absolutely refuse to answer that question on the ground that it might tend to incriminate me.

'Q. Who drove the car?

'A. I absolutely refuse to answer that question.

'Q. What shoes did you wear?

'A. I absolutely refuse to answer that question.

'Q. For the same reason?

'A. Yes, for the same reason.

'Q. Did you not shoot Brown that night?

'A. I absolutely refuse to answer that question on the same grounds that it might tend to incriminate me.

'Q. Is there any explanation of this matter that you wish to make at all?

'A. Not until I see my lawyers.'

"Do you remember that?"

A. "Why I couldn't say as to whether I do or whether I don't."

Q. "Did you make those answers to those questions?"

A. "I couldn't say as to whether I did or whether I didn't."

Q. "Were those questions asked you point blank whether or not you had shot Brown on the night of De-

cember 23rd, and didn't you say that you refused to answer on the ground that it might tend to incriminate you on this murder?''

A. ''That question never was asked me.''

Q. ''Now then, immediately after that, after you said you didn't want to make any explanation, after this question was asked you 'Is there any explanation of this matter that you wish to make at all?' 'A. Not until I see my lawyers.' After that is it not a fact that you were allowed to see Mr. Weeks, that you retired in a private room for a conference at 8:45 P. M. and after Mr. Weeks left the room that we went ahead again. And is it not a fact that you were then asked as follows:

'Q. Now you have seen Mr. Weeks privately?

'A. Yes.

'Q. Since I last asked you questions?

'A. Yes.

'Q. You talked with him alone?

'A. Yes.' ''

Q. ''Now then, did you make those answers to those questions?''

A. ''Why yes, I did see Mr. Weeks.''

Q. ''Did you make those answers?''

A. ''Why, I might have.''

Q. ''Now, then I asked you—

'Q. Now then again, I ask you whether there is any explanation of this matter at all that you desire to make.

'A. There is none whatsoever.'

''Did you make that answer?''

A. ''I couldn't say whether I did or whether I didn't.''

Q. ''Will you say that you did not make that answer?''

A. ''I won't say I did, nor I won't say I didn't.''

Q. "Weren't you repeatedly given the opportunity to make any explanation that you desired in reference to this matter, Prevost."

A. "My counsel advised me—"

Q. "Oh, no, that's not the question. Weren't you repeatedly on January 5th, that was just about 12 or 13 days after this murder, weren't you repeatedly asked if you had any explanation to make and didn't you give the answers that are recorded here."

A. "Why I couldn't say that I gave all of them. I might have given some."

CHAPTER 27

STATE OF INDIANA v. DAVID C. STEPHENSON

The case of the State of Indiana v. David C. Stephenson, tried during the months of October and November, 1925, was filled with a multitude of varying legal questions and contained many noteworthy examples of cross-examination. As a result of this trial the said defendant was convicted of murder in the second degree and sentenced by the court therein to life imprisonment, from which judgment an appeal was taken to the Supreme Court of Indiana, which is now pending.

According to the information obtained by the State preparatory to the trial the history of the chief defendant follows in brief:

David Curtis Stephenson came to Evansville, Indiana, from Texas and entered into the coal business there, just prior to the preliminary organization of the Ku Klux Klan throughout the North, he having been in the army, and for sometime an itinerant printer. Joining this new organization his personality, executive, oratorical and manipulating ability soon placed him at the head of its Indiana branch under the title of Grand Dragon. Rumor relates that during his leadership, which was extended to cover Ohio and possibly some other states, he was able to derive from his activities therein for his own personal purse approximately $2,000,000.

In 1924, however, he was ejected from the Ku Klux Klan subsequent to a trial resulting from various charges against him among which were alleged attacks made by him upon young women. Following this, and

during the political campaign of 1924, in which Stephenson posed as a large factor, and the election of the state ticket in which he claimed interest, he assumed the role of leader and dictator to the local legislature which met in January of 1925. His activities centered from his office on the third floor of an office building in Indianapolis, Indiana.

This headquarters it was alleged was a gathering for many members of the House and Senate and other leaders of prominence, all of which allegations percolating to the public through the medium of gossip were subsequently considered to have been considerably exaggerated.

Further facts taken from the evidence in this case itself showed that at this time in Irvington, a suburban section of Indianapolis, a young woman named Miss Madge Oberholtzer lived with her parents in the home which they had occupied since her childhood. Butler College was located in Irvington, and two or more blocks from the Oberholtzer residence Stephenson purchased, during this period, a palatial residence set back among a number of trees upon a large plat of land. He lived there alone with a man named Bennett whose wife served as housekeeper. Bennett was later convicted for accepting bribes as a state motor policeman. Although Stephenson previously had been married three times and divorced, this was not generally known in this university neighborhood. At his residence, it was said, many of the high officials and those prominent in the political world of the time called, and a number of social entertainments were here given, among which was a dinner dance whereat many notables and their wives were present, and to which Miss Madge Oberholtzer was invited.

The main allegations in the case as supported by the evidence of the State were as follows:

Stephenson had met Miss Oberholtzer first at the Governor's ball and again in connection with her work about the State House, she being secretary to the Young Peoples' Reading Circle, a department quasi-official and under some board regulated either directly or indirectly through the medium of the office of the State Superintendent of Public Instruction. On two occasions about this time Stephenson extended an invitation to Miss Oberholtzer to dine with him down town, which she had done in company with a girl friend of hers. She had been led through her contacts with him to believe that he was a man of wealth, power, influence and high moral standing.

On the evening of March 15th, 1925, Miss Oberholtzer returned to her home at approximately 9:30 o'clock. During that day, which was Sunday, she had first attended church, then driven in the afternoon with her girl chum and in the evening had filled a social engagement with some young man, a neighbor with whom herself and family were pleasantly acquainted. While she was thus absent from home several telephone calls were received which her mother answered. Word was left for Miss Oberholtzer to get into connection with Irvington 0492. These were from Stephenson who had talked with Mrs. Oberholtzer, stating that he was leaving the city in the evening and was very anxious to see her daughter upon a matter of business which he felt should deeply interest her.

Since her daughter's position was one that took her frequently into the field of commercial enterprise no apprehension concerning this was entertained, and upon the young lady's return at 9:30 P. M. her mother gave her the message. Miss Oberholtzer indicated, however, that she would not respond to the call then but await until the next morning, but learning that it was apparently

urgent she descended the stairs and called the number given. The substance of Stephenson's request to her was that she permit him to send an escort for her, since his time before leaving the city that night was so limited that he could not possibly come up to her house but that he wanted to talk to her upon some matters, as he said, of great importance.

Her experiences in the commercial world and his having so courteously called her own mother completely disarmed her of any possible suspicion. Accordingly when a state employee, Earl Gentry, whom she had frequently seen, called as her escort, she bade her mother farewell and in the warm March evening proceeded without hat, gloves, or purse and only a light wrap, to walk the two or more blocks that intervened between her home and the palatial residence of Stephenson.

As soon as she entered Stephenson's house she discovered the absence of the lady housekeeper, and directly two other men, one named Earl Klinck and another called "Shorty" came in through the back door. They were all armed, took her into the kitchen and compelled her to drink of something, just what is not known, excepting that thereafter her sensibilities in the main departed from her. She did remember trying unsuccessfully to reach a telephone, and that arrangements were made for a compartment on the Monon to Hammond that evening and something done about arranging for police protection. She was then placed on the rear seat of Stephenson's big Cadillac between two of the men and carried in some manner or other, which was never fully disclosed, to the Union Station and into a compartment of the Chicago bound train. She remembered that Stephenson and one other sat on either side of her in the back seat of the car on the way down, the former with a revolver in her side threatening to shoot her if she made an outcry.

Beyond that, in the main, the occurrences following were obliterated from her memory excepting that she was dimly conscious in the compartment as the train moved of having had her clothing torn from her and having her body chewed and bitten and lacerated by Stephenson.

The train reached Hammond at approximately 6:00 A. M., and by this time the young woman had sufficiently recovered her mentality to know where she was and what she was doing, but was still in fear and horror at her inability to accomplish anything against her captor. He repeatedly had said to her during the night, "I am the law in Indiana," and "my word is law in Indiana." Earl Gentry, too, had accompanied them and had occupied the upper berth of the compartment.

Upon alighting from the train she determined in her own mind upon one course of action—that was to kill herself and if possible Stephenson and accordingly with this purpose in mind she went with Gentry and Stephenson to a local hotel where the two men registered, Stephenson under the name W. B. Morgan and wife and Earl Gentry with his own signature, taking two rooms. "Shorty," hereinbefore mentioned, had under Stephenson's order during the night driven the Cadillac through to Hammond and shortly thereafter appeared at the hotel apparently by previous appointment. Breakfast was served but Miss Oberholtzer ate none and having only one objective in mind begged of Stephenson for money ostensibly to purchase a hat, with the misleading suggestion that she desired same to make her look more properly attired.

Unsuspecting Stephenson gave the said "Shorty" $15.00 and told him to go buy her a hat, and he and the young woman went out together and purchased same and as they returned she asked him to wait for her while she

went into the drug store to get some rouge. He did so and presently she returned with a bottle of bichloride of mercury tablets, which she had purchased with the money she had thus obtained, concealed upon her person.

Reaching the hotel she entered a room apart from that occupied by Stephenson and took the mercury tablets. Stephenson and his associates spent the morning in what manner no one may tell, but did not locate or find Miss Oberholtzer until late that afternoon, during which time she had within her system the fatal mercuric poisoning. They discovered her then thrown across the bed in her room fully clad with evidence of having vomited blood, and writhing in great agony.

Stephenson immediately demanded that she marry him, which she refused. He ordered some milk as an antidote and witch hazel to bathe her wounds. Then together with his associates, after leaving some cartridges in the room, he took her down to the car, promising to take her to a hospital, but instead proceeded at once in the direction of Indianapolis, a distance of about two hundred fifty miles.

During the whole return trip the girl lay on the floor in the back seat of the car vomiting blood and screaming with misery and begging her captors to throw her out on the road so someone by chance might pick her up. They refused, and arriving in Indianapolis, carried her to the garage in the rear of Stephenson's residence and to the second story thereof where she was imprisoned until the following day, Tuesday, at approximately 11:30 A. M.

At the moment they brought her to this aforesaid garage late Monday night, Mrs. Oberholtzer, her mother, and Miss Ermina Moore, her girl friend, and the attorney representing the Oberholtzers were at the Stephen-

son house demanding to know the whereabouts of Miss Oberholtzer. Mr. George Oberholtzer, her father, was lying very ill in bed so news of his daughter's absence was kept from him at the time.

Monday morning following her disappearance Sunday evening, her mother soon after she had discovered her daughter's failure to return had received the following telegram from Hammond purporting to come from her which said, "We are driving through to Chicago. Will be home on night train." Consequently, the Union Station was watched but when the young woman did not arrive it was thought advisable to make a direct demand at Stephenson's house for information concerning her. Circumstances had it that this demand was made simultaneously with Stephenson's return as above indicated.

These three, however, the mother, Miss Moore and the attorney were not aware of her return and were proceeding upon the theory that the girl was in Chicago due to the telegram previously referred to, but the said "Shorty" who had driven the car came around from the rear and having conversed with Bennett, the houseman, returned to notify Stephenson in the presence of Miss Oberholtzer that her mother was at the door.

All that night and the next morning the Oberholtzer family had no word of their daughter's whereabouts. About eleven o'clock Tuesday morning the father and mother, the former having been informed of his daughter's disappearance and leaving his sick bed to do so, together with their attorney, went to the offices of a private detective and made arrangements with him to take up the matter and upon their return home they discovered the girl in her room in a bed and in a dying condition.

She had been brought back during their absence by the aforesaid Earl Klinck, who was a deputy sheriff of Marion County and who, with Earl Gentry, was indicted with Stephenson for the murder.

Mrs. Shultz, who, with her son, lived with the Oberholtzer family was in the house at the time Klinck brought Miss Oberholtzer home and saw him and the girl. She later was able to identify Klinck in the courtroom. Klinck gave a wrong name and told Mrs. Shultz that she had been in an automobile accident and departed immediately. Miss Oberholtzer's first statement to Mrs. Shultz was, "I am dying."

Medical aid was instantly summoned and she was thereafter attended, not only by Dr. John Kingsbury, the family physician, but by five of the greatest specialists in the middle west until she died on the 14th day of April, 1925. These were Dr. Virgil H. Moon, who in addition to his practice occupies the chair of Pathology in the Indiana University School of Medicine; Dr. J. A. McDonald, diagnostician; Dr. H. O. Mertz, surgeon and specialist in kidneys, uretera and bladder; Dr. J. H. Warvel, famous pathologist, and R. N. Harger, Ph.D., a practising bio-chemist of high standing, all of Indianapolis.

The facts in the case were related by Miss Oberholtzer to those attending and about her and on the 28th day of March, after her story had been reduced to writing, she reiterated her belief that she was about to die and had no hope of recovery and signed as her dying declaration the statements which incorporated the outline of events just stated and which later became the foundation and the only direct evidence sustaining the allegations hereinbefore set out. Following this, she was intermittently conscious, partially so, or delirious until her death.

The state in the trial undertook to prove Stephenson to be the murderer of Madge Oberholtzer in the following manner:

1. By proof and introduction of the dying declaration of Miss Madge Oberholtzer.

2. By the testimony of other witnesses which constituted both direct and circumstantial corroboration of her statements.

These other witnesses and the nature of testimony rendered by them were in brief as follows:

Mrs. Oberholtzer testified regarding the preliminary telephonic communications and her daughter's departure on Sunday evening, March 15, 1925; a local telephone official verified the number Irvington 0492 as being Stephenson's, the same not being in the published directory; the employees of an Indianapolis hotel, through whom the compartment for Stephenson was secured and reserved, supported the allegation thereof; the conductors and trainmen at the Union Station in Indianapolis told of the calling for the reservations and of the bringing of a hatless young woman apparently under custody of officers into the compartment; the same witnesses related the incidents of the alighting of the parties at the station in Hammond; employees of the hotel at Hammond who testified not only to the entrance of the party but to its later exit and these corroborated the finding of the witch hazel bottle, the milk bottle and the blood and of discarded cartridges in the room.

Irvington residents testified concerning the barking of dogs in the Stephenson garage and of the return of the machine at 11:30 at night at Stephenson's home. A woman resident of Irvington who lived just back of the Stephenson residence heard a woman's scream in the dead of that same night coming from the direction of the said garage followed by the barking of dogs.

On the following morning a neighbor testified that men in the Stephenson yard cleaned out the rear of the Cadillac car. Mrs. Schultz, as hereinbefore indicated, identified Klinck.

3. By the medical testimony, which was to the effect that the bites from the human teeth caused staphylococci infection to enter the blood stream of the victim, which later superimposed itself upon her mercuric poisoning; that Miss Oberholtzer would have recovered from her mercuric poisoning after living twenty-five days following the taking thereof (she lived thirty) had it not been for the presence of this said staphylococci infection; mercuric poisoning lowers the temperature while the victim of this case died at a fever of one hundred and five degrees caused by the said staphylococci infection. They further testified that the action of defendant, Stephenson, in forcibly taking her into his custody following her taking poison and restraining her for twenty hours from receiving medical aid hastened her death and shortened her life.

4. The theory of the State in legally supporting the charge of murder under these facts and circumstances briefly was as follows:

The murder statute in Indiana reads, "Whoever purposely and with premeditated malice or in the perpetration of or attempt to perpetrate a rape, arson, robbery or burglary or by administering poison or causing the same to be administered, kills any human being, is guilty of murder"; therefore that the defendant Stephenson was chargeable with the knowledge of the natural and probable consequences of his wrongful act, namely that the chewing and biting of Miss Madge Oberholtzer would or might or did in fact infect her blood with the germ of staphylococci which is a germ carried in the human teeth; that said wrongful act was committed during the

perpetration of a rape or attempted rape; that subsequently thereto the victim had taken poison and that the defendant became possessed of the knowledge that she had so taken said poison, being at the same time chargeable with the knowledge of the staphylococci infection in her blood stream; that he knew or was chargeable with the knowledge that the combination of the two disabilities for one of which he was directly and the other indirectly responsible might or would cause her death; that in the end she did die from the effects of the staphylococci infection with a temperature of 105; mercuric poisoning in itself lowers the temperature; that a wrongdoer is responsible for all the natural or all the probable consequences of his wrongful act.

That in addition while the defendant Stephenson did not give Miss Madge Oberholtzer the mercuric poisoning directly, nevertheless after he knew she had taken same he aided and abetted its activity by restraining her liberty and taking her forcibly into his custody and preventing her from receiving medical aid and was then and thereafter responsible for the increasing activity of said poison within said victim.

That again the defendant was chargeable with the knowledge that his wrongful act—namely that the chewing and biting of Miss Madge Oberholtzer would or might or did in fact infect her blood stream with the germ of staphylococci which is a germ carried in the human teeth; that when subsequently she had taken bichloride of mercury poison defendant knew or was chargeable with the knowledge of the presence within her blood in addition to the bichloride of mercury as aforesaid, of the said staphylococci; that upon discovering such condition chargeable with the knowledge thereof as aforesaid, defendant did late in the afternoon in Hammond assume custody of the said Madge Oberholtzer, she then and

there being a helpless human being; that having so assumed such custody of said helpless human being, he being at such time chargeable with such knowledge as aforesaid, he did thereupon together with his associates forcibly carry her to his automobile, misleading her with the promise that he was taking her to a hospital, and forcibly transported her some two hundred fifty miles, consuming several hours, back to the city of Indianapolis, and then forcibly imprisoned her while chargeable with such knowledge of her condition and that she was dying, and having thus assumed custody of a helpless human being, he became guilty, thereby, not only (to revert to a popular expression) of a "sin of omission,"—that is, of failure to call medical aid so having assumed such custody—which would in itself upon the assumption of such custody have constituted a felony, but was guilty of a "sin of commission," namely that he while thus chargeable with the knowledge of her condition, and having so assumed custody of said helpless human being, forcibly imprisoned her and forcibly prevented her from reaching medical aid and attention.

The further theory and contention of the state was that the stem of the law of murder in Indiana omitting the supplementary clauses is that "whoever purposely, and with premeditated malice kills any human being, is guilty of murder." This statute being similar to the murder statutes in other states and identical with the old common law was to be interpreted as follows: that there are as many ways of committing murder as there are ways of taking human life; that forcibly assuming custody of a helpless human being in a dying condition even though no responsibility for that original condition may be laid at the door of the accused, nevertheless if he having knowledge of that condition and that his victim will die, unless properly cared for, takes her to a garage

and forcibly imprisons her there, cuts her off from all communication whereby she might be aided, that that in itself constitutes a way of taking a human life, and if that imprisonment be malicious, wilful, premeditated and deliberate, it constitutes an act of murder.

Additional evidence that defendant Stephenson knew she was in a dying condition was given to the jury through the medium of the girl's statement which contained this quotation from him while they were enroute back from Hammond, "This takes guts to do this Gentry, she is dying."

The state further contended that as death is appointed to all the living, any act of felonious homicide is merely one that hastens the inevitable event; therefore since the act of the accused, the bringing of Miss Oberholtzer back to Indianapolis and so imprisoning her, allowed the poison mercury and staphylococci infection for a period of some twenty hours to that much more readily destroy her chance of recovery and to decrease the prolongation of her life and accelerate its end; it was an act of murder in that he thus hastened the inevitable event, deliberately, purposely and with premeditated malice.

Further the state contended that when one is suffering from a malady not necessarily in itself fatal—for example either the staphylococci infection or mercuric poisoning or both, if properly treated—if nevertheless the accused shall commit some additional act against the victim which also is not in itself fatal—namely the imprisonment within a garage—still if said wrongful act combined with the complications from which victim is suffering either brings about or hastens death, it is an act of felonious homicide, the degree thereof to be determined by whether or not the act was premeditated, wilful and malicious; this, even though the accused might not

have been responsible for the original condition of the victim, though in this case he was.

The State further asserted that when a victim is suffering from the fatal malady with no hope of recovery (it was the contention of the defense that after Miss Oberholtzer had taken the mercuric poison she could not have recovered) and will die regardless of medical attention and even when the accused was in no wise responsible for victim's dying condition (which in this case he was), still if the accused commits some wrongful act upon or against said victim such as imprisonment within a garage for twenty hours, which act would not have been fatal in itself, but which act because of its natural effect upon victim in said dying condition accelerates and hastens the death of said victim already dying, he is guilty of felonious homicide by so accelerating said death if said wrongful act be malicious, wilful and premeditated.

The State's evidence was presented by William H. Remy, prosecuting attorney of Marion County. To assist him the court appointed Charles E. Cox, formerly Chief Justice of the Supreme Court of Indiana and President of the Indianapolis Bar Association and Ralph E. Kane, a practitioner of long experience and a trial lawyer of pronounced ability.

The indictment for murder in the first degree was returned by the Grand Jury of Marion County against David C. Stephenson, Earl Gentry and Earl Klinck, and the defendants there arrested and held without bail. Gentry and Klinck in the subsequent trial were acquitted. A change of venue from the county was granted upon their request and the case taken to Hamilton County of which Noblesville, Indiana, is the county seat.

Following this a petition was filed by the defendants to be let to bail and evidence was heard thereon. Under

the Indiana law the defendants in a murder trial have the right to a preliminary hearing for bail and themselves to subpoena the state's witnesses to ascertain if the presumption of guilt appears to be strong.

This petition was denied however by Judge Fred M. Hines of the Hamilton Circuit Court whereupon defendants asked for a change of judge, this being granted, and after much bickering Judge Will M. Sparks of Rush County, one of the ablest jurists in Indiana, was selected to try the case.

Much brilliant cross-examination appears in the long trial that followed, only a small portion of which can be given.

The defense led by Messrs. Eph Inman and Ira Holmes of Indianapolis, both outstanding criminal lawyers, aided by a battery of assistants, was vigorously made.

In the trial the testimony of some one or more witnesses lasted over days. Accordingly it is not practicable to completely reproduce the testimony, but selections herein given will exhibit to the reader much skill manifested in the cross-examinations.

First then to consider is a portion of the testimony of Mrs. Eunice H. Shultz, the elderly lady who lived at the Oberholtzer home with her son. She is the one above referred to who first saw Miss Madge Oberholtzer when she was brought home by Earl Klinck and on direct testimony identified Klinck in the courtroom and further testified to her contact with and care for the young woman.

Cross-examination of Mrs. Eunice H. Shultz.

Questions by Eph Inman.

He is now referring to the Oberholtzer home.

Q. "Now is there a porch that stands in front of the front door?"

A. "Yes, sir."

Q. "Is that a porch that turns?"

A. "All the way, the whole front of the house."

Q. "All the way the front part of the house?"

A. "Yes, sir."

Q. "And there are steps that lead from the walk up on the porch, is that right?"

A. "Yes, sir."

Q. "Now did you go to the door with him when he left?"

This referred to Klinck as he had brought the girl home and departed directly.

A. "I stayed in the hall."

Q. "In the hall?"

A. "Yes.

Q. "And is there a glass in the front door?"

A. "There is."

Q. "And was it open and unobstructed so you could see through the glass or not?"

A. "I could see through the glass."

Q. "Did you see him go through the door and away from the porch?"

A. "I went immediately up stairs as he closed the door."

Q. "So you didn't see where he went after he left the door?"

A. "No."

Q. "You don't know what direction he went?"

A. "No."

Q. "You didn't see him go towards any car?"

A. "No, sir."

Q. "Do you recall testifying, Mrs. Shultz, in the hearing that was held in this courtroom on the bail question about last June?"

A. "Yes, sir."

Now the purpose of the bail hearing was revealed. The

defense attorneys had kept a verified record of every word of each witness' testimony therein. Nearly a year had elapsed since the actual occurrences. One slip of memory and the cross-examination would take a severe turn.

Q. "You recall that?"

A. "Yes, sir."

Q. "I will ask you, to refresh your memory, if you didn't say in your testimony in that case that you saw the man go towards the car when he left the door?"

A. "Well, I may have seen him just turn that way by the glass being there, but I didn't look after him on account I wanted to run upstairs."

Q. "I know, but did you say that in substance in your testimony last June, that you saw the man walk towards the car?"

A. "I don't know if I said that or not, if I did you know I did, but I don't remember that I said that surely, but I know I ran quickly up."

Q. "But you do say now that you didn't see which way he went?"

THE COURT: "She said she didn't know."

A. "I don't remember which way he went."

Q. "Now I believe you said this forenoon that it was a closed large car and was a dark color?"

A. "I said I was of the impression that it was a closed car, and I know it was large and a dark car."

Q. "Now I will ask you if you didn't say in your testimony last June in the bail hearing here, when you were a witness on the stand, that you didn't look at the car and could not tell what kind of a car it was?"

A. "I remember of saying that it was a dark car, but I didn't know the name of the car or —"

Q. "Did you?"

A. "I remember saying that I knew it was a dark car and a large car."

Q. "You say now it was a closed car you think?"

A. "I just had the impression it was a closed car, but I was not questioned as to the closed car as I know of; at any rate that is my impression now, that it was a closed car."

Q. "I will ask you, to refresh your memory Mrs. Shultz, if in that bail hearing this question was asked you and if you made this answer: 'Was it an open car or closed body?' Answer, 'I don't know.' Did you make that answer?"

A. "Well, I don't know yet, but that was my impression."

Q. "Did you make that answer?"

A. "Yes, I did."

Q. "You say that the gentleman who came in to the house carrying Miss Oberholtzer was this gentleman here?" (Counsel indicating Mr. Klinck.)

A. "Yes, sir, at the end."

Q. "At the end here?"

A. "Yes."

The defense had to break down every identification possible. Mrs. Shultz had identified Klinck. How easy it would have been for some one from the prosecution to have pointed Klinck out to her and have inspired her to apparently remember him. Mrs. Shultz the white-haired refined mother of a college professor did not look like a perjurer. The reader may judge as to whether or not Mr. Inman succeeded in discrediting her.

Q. "How many times have you seen him since that time?"

A. "I saw him first at the grand jury Circuit Court in Indianapolis."

Q. "You saw this man?"

A. "Yes, sir, and I saw him at this place each time that I came here at the bail."

Q. "When was it that you saw this gentleman at the grand jury in Indianapolis?"

A. "It was a few weeks after he brought Madge home."

Q. "What was he doing there at the grand jury?"

A. "He was not in at the grand jury room, but he was in the Circuit Court room."

Q. "You mean in the Criminal Court?"

A. "The Criminal Court."

Q. "And you saw him there?"

A. "Yes."

Q. "Did somebody point him out to you there?"

A. "No, sir, I saw him there."

Q. "Now when you came here to the bail hearing in this courtroom last June some time, did somebody point this gentleman out to you?"

A. "No, sir."

Q. "As Mr. Klinck?"

A. "I saw him and knew him."

Q. "Did Judge Cox point him out to you?"

A. "No, sir."

Q. "I will ask you, Mrs. Shultz, if it is not a fact that Mr. Klinck was sitting right over here somewhere during one of the bail hearing dates, and if Judge Cox didn't accompany you down the aisle to the front row of the seats to about this point and point his finger, and if you didn't stand there in the presence of Judge Cox and look at him?"

A. "Judge Cox wanted to know —"

Q. "No, I beg pardon, did that occur?"

A. "I saw him before that time, and I think —"

Q. "Now, Mrs. Shultz, will you kindly answer my question?"

A. "Yes, he was there."

Q. "Judge Cox came with you and pointed him out?"

A. "I don't know that he pointed, he asked me if I knew him?"

Q. "I will ask you if he didn't point his finger straight at Mr. Klinck?"

A. "I didn't know it if he did."

Q. "And did Judge Cox or anybody else point him out at any other time?"

A. "No, sir, I don't know of any other time."

Here Mr. Inman was cleverly wording his question as though witness had just admitted Judge Cox of the State's counsel had pointed Klinck out to her. She had admitted walking down the aisle with the former. Note the finish of this contest.

Q. "That was the only time?"

A. "But I say I never saw his finger."

Q. "But you do recall that Judge Cox did come down —"

A. "He was with me."

Q. "Down the aisle?"

A. "He was with me."

Q. "And Mr. Klinck was discussed at the time, was he not?"

A. "During that trial?"

Q. "No, at the very time Judge Cox came down the aisle right here?"

A. "Yes, sir, he wanted to know if I knew him and I said, yes, sir, I do, and I saw him."

Re-direct examination.

Questions by William H. Remy.

Q. "Mrs. Shultz, on every occasion that you have seen Mr. Klinck since the time that you saw him at the Oberholtzer home, has any one ever pointed him out to you or have you pointed him out to us?"

A. "I have pointed him out to you."

Mr. Remy. "That is all."

Mr. Inman. "That is all."

The next state's evidence here to be considered is that furnished by Dr. John K. Kingsbury, the family physician who lived in Irvington and who had reached Miss Oberholtzer's bedside in response to the call of Mrs. Shultz, a few minutes after the girl was brought home. He had attended her together with the specialists called in the case until her death and likewise was called by the defense attorneys to give evidence as to its cause on the bail hearing. His direct testimony in the trial itself here considered supported the state's theory that the victim had died in a high fever from staphylococci infection superimposed upon bichloride of mercury poisoning and the portion of the cross-examination below given tends to compel the doctor's testimony to contradict that given in the summer previous.

Cross-examination of Dr. John K. Kingsbury.

Questions by Eph Inman.

Q. "Were these reasons which you have just testified here that you gave her, the only reasons that you gave her why you thought she could not recover?"

This goes to the night of March 28, 1925. Dr. John Kingsbury had on that occasion told Madge Oberholtzer she could not get well and that she was going to die and had stated to her certain reasons why in his opinion that was true. Defense counsel is attempting to show a conflict in these reasons stated at several times.

It was the claim of the defense that the victim had not died of the staphylococci infection but of mercuric poisoning self-administered. In other words that the tragedy was one of suicide instead of murder.

A. "I don't know; that is all I recall right now."

Q. "You recall do you, Doctor, testifying in this case in the bail hearing in this case in June last?"

A. "Yes, I do."

Q. "You didn't testify in that hearing, did you, to the reasons which you have said today on the witness stand that you gave to her why she could not recover?"

A. "I don't know whether I did then or not; that is what I told her, however."

Q. "You were asked in that examination in the bail hearing here to state all that you said to her and all that she said to you on that question of her recovery, were you not, Doctor?"

A. "I don't recall the question then."

Q. "I will ask you now, to refresh your memory if it is not true, Doctor, that you testified in the bail hearing here in June that what you did say to her was—as the reason why she could not recover, was that the kidneys were in such condition from the poison, and that the tissues were so broken down and destroyed from the poison, that the poison had made such spread into her system, that for that reason she could not recover?"

A. "I don't recall the phraseology of the reply then; the context was identical with what I —"

Q. "Was that the substance of what the reasons were that you gave in that testimony?"

A. "I don't remember, Mr. Inman, just what I stated at that time.

Q. "I will ask you if it is not true, Doctor, that in your testimony in the bail hearing, you didn't mention a single reason that you have given here upon this stand?"

A. "I could not tell you."

Q. "You could not say?"

A. "No."

Q. "Have you had conversations with those who are prosecuting this case?"

A. "Yes, sir."

Q. "Since the bail hearing?"

A. "Yes, sir."

Q. "And this time—between that hearing and this time?"

A. "I have, yes, sir."

Q. "How frequently have you talked with attorneys representing the prosecution in this case?"

A. "Twice I think."

Q. "And have you discussed those things which you have testified today?"

A. "No, sir, not that."

Q. "When did it first occur to your memory, Doctor, that you said to Madge Oberholtzer on the evening of the 28th of March, that from the shock and the things that had happened to her, and from her lack of food and lack of medical attention that she could not recover?"

A. "Well, it has been there all the time, I don't know when, whether it has had expression at any other time or not; they were all true and I gave them to her as such."

Q. "Now on the 3rd day of April, either the 2nd or 3rd day of April, five days after you had advised Miss Oberholtzer that she could not recover, you gave her a transfusion of blood for the purpose of helping her, didn't you?"

Since before a dying declaration is admissible as evidence, the patient must be actually in a dying condition, conscious of and believing in the imminence of death, defense counsel is trying to show that witness himself thought his patient had a chance. Did he not five days later indulge himself in a blood transfusion for her?

Too, the medical theory of the State that had not the fever from the staphylococci infection set in that she would have recovered opens a door for another conflict.

A. "Yes, sir."

Q. "That was about five days after that?"

A. "I think so."

Q. "And that transfusion of blood came from her brother?"

A. "Her brother, yes."

Q. "But you had other doctors present assisting you in that transfusion?"

A. "Yes, sir."

Q. "You have—now Doctor, for the purpose of further refreshing your memory, and to be specific about it, I will ask you if you didn't give this answer in the bail hearing telling the reasons that you gave to her on the evening of the 28th of March why she could not recover: 'I told Miss Oberholtzer that she could not recover; that she was going to die; there was no chance for her to recover; she said Doctor, that is all right, I want to die; I told her why, because the poison as it had acted upon the tissues of the body and had destroyed them, and her blood test taken on that day or the one immediately preceding had shown a grave state, one that was worse than any preceding; such disintegration of tissues that there was no chance for error, and that she could not recover and I wanted her to understand in that light.' Now does that refresh your memory as to the reasons that you then gave which you stated to her why she could not recover?"

A. "No, that sounds very much like my—my way of telling it; I have no reason to doubt the correctness of that testimony."

Q. "You intended in that examination to give the reasons that you stated to her, did you?"

A. "As they occurred to me at that time, yes, sir."

Q. "How many days did she live after you gave her the advice that she could not recover?"

A. "Well, from the 28th of March until the 14th of April."

Q. "It would be seventeen days, would it not?"

A. "I don't know."

Q. "Eighteen including —"

A. "Eighteen days I think."

Q. "And she died—was it the second or third of April that you gave her the blood transfusion?"

A. "On the third I think it was."

Q. "And she died eleven days after that?"

A. "I think so, yes, sir."

Q. "She had nephritis?"

A. "Indeed she did."

Q. "You treated her for that?"

A. "Yes."

Q. "And you treated her for the purpose of arresting the spread of the poison?"

A. "Well, I could not hardly say that; I treated her in an attempt to remedy the damage done by poison."

Q. "The nephritis was the result of the poison?"

A. "Largely."

The cross-examination of Asa J. Smith, attorney for the Oberholtzer family, through whose instrumentality the dying declaration, reduced to writing, was taken, was likewise conducted by Eph Inman. In this instance relative to the following cross-examination the witness had testified directly that throughout the month preceding the victim's death he had been at the Oberholtzer home nearly every day; that he had listened to Miss Oberholtzer relate her story; that Miss Ermina Moore, her girl friend, a young high school teacher of most excellent reputation, had listened to her story; that Miss Moore had taken notes from time to time and that he the said witness had on the twenty-fourth or twenty-fifth day of March in his office from his own memory written down notes consti-

tuting the outline of Miss Oberholtzer's story to him; that on the twenty-sixth day of March, 1925, he had called Miss Ermina Moore to his office and that he had taken Miss Moore's notes and his own notes and had, in the presence of Miss Moore and Mr. Griffith D. Dean, his legal associate, a lawyer of high standing and of long experience at the bar, written down therefrom, reading out loud as he wrote for the purpose of receiving all of the suggestions needed from Miss Moore, a complete outline of the statement of Miss Oberholtzer relative to the facts in the case; that thereupon he had called in the stenographer and had dictated from what he had then written the statement; that two days later on the twenty-eighth day of March, 1925, he had again called Miss Moore to his office; had taken what the stenographer had written upon the typewriter, corrected it where clerical errors had occurred, and had caused her to rewrite it, redictating same; that thereupon he and Miss Ermina Moore and Mr. Griffith D. Dean had all three gone to the Oberholtzer home, Miss Moore and himself taking with them in his car a notary public, Mr. Dean proceeding alone upon the street-car; that upon reaching the aforesaid home he had called the family physician Dr. John Kingsbury; that they had gone up to Miss Oberholtzer's room after the doctor had talked to her and she had expressed her belief that she could not live; and that he the witness had read the statement over to her in the presence of the three above named witnesses and that she had signed it. Counsel is here attempting to confuse the witness or to break down his testimony relative to the composition of this statement in order to prevent if possible its introduction as evidence.

Cross-examination of Asa J. Smith by Eph Inman.

Q. "Now you say that from day to day, from March

17 up to March 28, you went out to see and you talked with Madge Oberholtzer?''

A. ''Yes, sir.''

Q. ''At various times?''

A. ''Yes, sir.''

Q. ''And you say on various times she told you parts of the story?''

A. ''Yes, sir.''

Q. ''And you kept it in memory?''

A. ''Yes, sir.''

Q. ''And when the time came for you to piece it out and write it out and make notes of it and dictate it to the typewriter, to the stenographer, you dictated what you say, I believe, was the substance of what she told you from your memory, is that right?''

A. ''No, I didn't say that.''

Q. ''Do you recall saying to Mr. Remy a few minutes ago, 'I wrote the substance of what she said at my office'?''

A. ''Yes.''

Q. '' 'From my memory'?''

A. ''I did.''

Q. ''You said that?''

A. ''Yes, sir.''

Q. ''You wrote the first draft of this statement mentioned about three or four days before the 28th of March, did you?''

A. ''No, sir.''

Q. ''You didn't? Do you recall saying to Mr. Remy just a few minutes ago, this: 'I wrote it three or four days before the 28th of March'?''

The cross-examiner is interrogating witness regarding every movement and every moment relative to any activity regarding the dying declaration. It is imperative to the defense to render this declaration inadmis-

sible as it constitutes the only direct evidence of the incidents of the alleged crime.

Questions of a general nature are put for the purpose of confusing witness and obtaining from him a reply later to be made to appear inconsistent with some specific detail.

A. "What does the time refer to, Mr. Inman?"

Q. "The statement?"

A. "No, it does not."

Q. "Well, what does it refer to?"

A. "It refers to the notes that I took down."

Q. "Oh, you wrote the notes three or four days before the 28th of March?"

A. "Yes, sir."

Q. "And then on the 26th day of March, two days before you say this statement was signed, you put your notes together and dictated the substance of the notes that you had to Mrs. Clermont the stenographer?"

A. "That is not all of what I said, no, sir."

Q. "Well, is that a part of what you said, did you say that?"

A. "I dictated nothing from the notes that I prepared three or four days before March 28."

Q. "You didn't?"

A. "No, sir."

Q. "Well, what did you dictate it from, your memory?"

A. "I dictated it from that which I had written, which was taken from the notes I had prepared and Miss Ermina Moore's notes."

Q. "Yes?"

A. "Yes, sir."

Q. "Now that is the way it is?"

A. "That is the way it is."

Again an attempt is made to secure from the witness a contradiction.

Q. "So on the 26th of March you dictated the statement first to the stenographer from the notes which you had prepared and from the notes which Miss Ermina Moore had prepared, is that right?"

A. "No, sir, that is not right."

Q. "What is it?"

A. "From the notes which Miss Ermina Moore had prepared and which I had prepared I wrote in longhand, in her presence and in the presence of Mr. Dean, the statement, and from what I had then written in longhand I dictated to the stenographer."

Q. "Oh yes, I will get to it. So if I understand you rightly, you first took the notes you had written from time to time?"

A. "Yes."

Q. "And took the notes which Miss Moore had written from time to time?"

A. "Yes."

Q. "And from that combination of things you wrote out the statement originally in your longhand?"

A. "Yes."

Q. "And then from what you had written in longhand with pen or pencil you dictated that statement to the stenographer, is that right?"

A. "Yes, sir, that is correct."

Now the substance of the facts have been stated. The cross-examiner will now drift away from this particular point and perhaps return later with a confusing question.

Q. "Now how many times did you re-dictate it before it was signed?"

A. "Once."

Q. "When did you make the last dictation of it?"

A. "Saturday, March 28."

Q. "What time in the day did you do that dictation?"

A. "Saturday, after I had finished correcting the statement which had been typed Thursday; and I expect it was about noon, maybe a little before, and maybe the dictation took afternoon, I am not just sure about that, or how long that took."

Q. "Now the notes which Miss Moore furnished you, you were not present when she wrote those notes?"

A. "No, sir."

Q. "You were not present when Madge Oberholtzer told her what she put into those notes?"

A. "No, sir."

Q. "So you don't know how nor where she got those?"

A. "No, sir."

Q. "You just took them on their face?"

A. "Except what she told me."

Q. "I am not asking what she told you."

A. "She told me that —"

Q. "I beg your pardon, I say I am not asking you that?"

A. "Oh, I beg your pardon."

Q. "Now when you got ready, when you finished the last draft of the combination of notes and dictations and re-dictations, Mr. Dean was present, was he?"

A. "Yes, sir."

Witness has testified that Mr. Griffith D. Dean took no part in the actual work of preparing the statement. However, on the bail hearing he had included Mr. Dean's name as a participant. The interrogator is coming to that point.

Q. "Did he take any part in the preparation of the statement?"

A. "I think he took no active part, except he was there."

Q. "Did he take some inactive part?"

A. "Well, he was just there, that was all."

Q. "Was that all he was doing, just there?"

A. "Yes, sir, he didn't take any active part."

Q. "He didn't make any suggestions about it?"

A. "I don't remember that he did, no, sir."

Q. "Was he present when you and Miss Moore were talking it over?"

A. "Yes."

Q. "Did he participate in that conversation?"

A. "Yes, sir."

Q. "He did? He was then a lawyer along with you?"

A. "Yes, sir."

In some manner the defense must show that Mr. Dean also helped in the making of the statement. Mr. Inman left that for a moment only to come to it later. Now for the statement again.

Q. "How many pages of the longhand were there as you first wrote it out with your hand?"

A. "I don't remember that."

Q. "Was it written in pencil or ink?"

A. "Pencil."

Q. "Pencil?"

A. "Yes."

Q. "Was anybody present when you wrote that out?"

A. "Now you are referring to the very first time?"

Q. "Yes, the longhand copy?"

A. "Well, do you mean the copy of the statement I wrote on the 26th, or the notes I wrote before?"

Q. "No, you said awhile ago you first took the com-

bination and then wrote out the statement in longhand, now that is the only thing I am inquiring about?''

A. ''Oh the question is, how many pages?''

Q. ''Yes?''

A. ''Well, I don't remember.''

Q. ''Did Mr. Dean read that over as you had written it out with your hand?''

A. ''No, sir, he heard me dictating, he didn't read it.''

Q. ''He sat by while you dictated it, did he?''

A. ''Yes, sir.''

Q. ''And could have been listening?''

A. ''Yes, sir.''

Q. ''Was Miss Moore present when you wrote it out in longhand?''

A. ''She was.''

Q. ''She saw you write it?''

A. ''And heard me read it as I wrote it.''

Q. ''How long did it take you to write that out?''

A. ''Which occasion do you refer to?''

It is very simple to slip into a trap and counsel is shrewdly approaching the matters relating to the composition of the statement again.

Q. ''The occasion you are telling me about?''

A. ''The 26th; well, I imagine about two hours.''

Q. ''Did you incorporate into your longhand first of all the notes which Miss Moore gave you?''

A. ''Yes, sir.''

Q. ''And all of the notes which you had?''

A. ''Yes.''

Q. ''You didn't leave out any of them?''

A. ''I did not.''

Q. ''Did you add anything to them as you went along?''

A. ''I did not.''

Q. "Your purpose was to give the substance of what you had found out?"

A. "Yes, sir."

Q. "So you selected the words and built up the phrases?"

A. "Yes."

Q. "To make what you thought was the substance?"

A. "I had a purpose to make the substance, and I had another purpose also."

Q. "You had a purpose to put the proper coloring on the words that you selected yourself?"

A. "I did not, that is not true."

Q. "Now where did you keep this first longhand manuscript of the statement after you had written it out and before you dictated it on the 26th to the typewriter?"

A. "You mean my notes?"

Q. "I mean the statement, the copy that you wrote out in longhand?"

A. "You will have to explain what you mean before I answer; do you mean what I wrote on the 26th, or the notes I prepared before that?"

Q. "No, I am asking about the first longhand copy of the statement which you say you wrote out with pencil in longhand?"

Mr. R. K. Kane. "That was on the 26th."

Q. "Was that on the 26th?"

A. "I wrote out notes covering what she said before the 26th."

Q. "How long before the 26th?"

A. "I think a day or two."

Q. "That would be along about the 24th or 5th?"

A. "Something, a day or two."

Q. "So that you had not prepared any of the notes before that time?"

A. "No, sir."

Q. "The 24th or 25th?"

A. "No, sir."

Q. "So from the 17th of March, when you had your first conversation with Madge Oberholtzer, and throughout the intervening time from the 17th day to—say down to the 24 or 25th, when you prepared these notes, you simply carried these pieces in your memory?"

A. "That is a correct statement of the fact."

Q. "How many pages were there to the statement itself?"

A. "I don't remember that, I think about nine."

Q. "About nine?"

A. "I think so."

Mr. Inman. "Would you let me take that statement, Mr. Remy?"

Mr. Remy. "Yes."

Q. "I understood you to say, Mr. Smith, that you would read—when you took this out to Miss Oberholtzer, you would read a sentence and then stop?"

A. "Yes, sir."

Q. "And then you would ask her to affirm or deny?"

Note the socalled dying declaration was consistently referred to as the statement for the reason it had not yet been admitted into evidence as a dying declaration.

A. "That is what I said."

Q. "Well, that is correct is it?"

A. "Yes, sir."

Q. "And you say that sometimes, in the midst of reading a sentence, she would interrupt you to say that that was correct?"

A. "Yes, sir, frequently."

Q. "She would interrupt you in the midst of your reading a sentence, before she had heard read all of the sentence, and tell you that was correct, would she?"

A. "That is the truth."

Q. "That is what I am trying to find out, sir. Who were present when this was signed?"

A. "Griffith D. Dean, Dr. John Kingsbury, Ermina Moore and myself."

Q. "You said awhile ago that you had a notary, who was that?"

A. "I don't know her name, but she was not present."

Witness' direct testimony had revealed that a copy of the statement had been sworn to before a notary public.

Q. "Well, what part did she do?"

A. "After that statement was signed, the notary was called up and she acknowledged her signature to the affidavit which was prepared from a copy of that, had been prepared."

Q. "She acknowledged her signature to the affidavit?"

A. "Yes, sir."

Q. "Where is that affidavit?"

A. "I don't know."

Q. "Do you know what became of it?"

A. "I turned it over to the state's attorney."

Q. "When?"

A. "Oh when I turned that over, I think it was."

Q. "Did the notary public take the acknowledgment of the signature of Madge Oberholtzer to this statement?"

A. "No, sir."

Q. "Why didn't you have her do that?"

The court sustained the objection of the State.

Q. "Have you seen that affidavit since you turned it over?"

A. "No, sir."

Q. "When was that prepared?"

A. "I had a copy, carbon, made of the statement."

Q. "And you had ——"

A. "I had a jurat."

Q. "You had her sign that as an affidavit, did you?"

A. "Yes."

Q. "Why didn't you have her sign this as a notary?"

Mr. Remy. "The State objects to that, your Honor."

The court sustained the objection of the State.

Q. "Did you take that affidavit when she signed it?"

A. "You mean act as a notary?"

Q. "No, did you take it into your possession after Miss Oberholtzer signed it?"

A. "Yes."

Q. "When did she sign that?"

A. "Immediately after she had signed this."

Q. "Which one did she sign first?"

A. "The dying declaration—I beg your pardon—that statement you have in your hand."

Q. "Did she sign the other statement?"

A. "Yes."

Q. "And did she sign that immediately after she had signed this?"

A. "Yes, sir."

Q. "And while she was in the same position?"

A. "Yes."

Q. "And in the presence of the same parties?"

A. "Yes, sir, with one additional."

Q. "Who?"

A. "That was the notary public."

Q. "You don't know her name?"

A. "No, sir."

Q. "Where did you get her?"

A. "She was a friend of Miss Ermina Moore's."

Q. "How much time elapsed between the signing of this document and the signing of the affidavit?"

A. "When she signed that document, some one, I don't know whether I stepped to the door and called down stairs to the notary and she came up and came in and she signed the ——"

Q. "Who had brought the notary?"

A. "I had."

Q. "You had?"

A. "Yes, sir."

Q. "Did you drive out and take her in your car?"

A. "I did."

This line of questioning continued. Then:

Mr. Inman. "Mr. Remy, will you be willing to let us see the affidavit?"

Mr. Remy. "I have not it with me, it is in Indianapolis."

Mr. Inman. "If you don't mind will you bring it up?"

The Court. "The affidavit, I don't think, is proper testimony."

Q. "Now are you sure Dr. Kingsbury was in the room at the time Miss Oberholtzer signed this statement?"

A. "The one you have in your hand?"

Q. "Yes."

A. "He was."

Q. "And sure Miss Moore was?"

A. "Yes."

Q. "And that Griffith Dean was?"

A. "Yes, sir."

Q. "Did you testify in the bail hearing here in June in this case?"

A. "Yes."

Q. "I will ask you if you didn't say in your testimony in that case that Griffith Dean helped you to prepare this statement?"

A. "Yes, sir."

In the bail hearing conducted in chief by the defense counsel only such information had been brought out as he thought at the moment advisable. Here followed a vigorous effort to show witness in a bad light before the jury.

Q. "You say now that he took no part in it, is that right?"

A. "Yes, and I meant then, of course, that he was in the room and a party in that connection with the making of the statement."

Q. "Well, if he helped you to prepare the statement, as you said in your bail hearing, what did he do?"

A. "I answered that and explained that."

Q. "You regarded him as helping because he was sitting there?"

A. "Yes, sir."

Q. "Now what kind of a pen was used in signing her name to this instrument?"

A. "Fountain pen."

Q. "Who furnished it?"

A. "As I remember it was Mr. Dean's pen."

Q. "Was it a stub pen?"

A. "It was a fountain pen, I don't know whether a stub pen or not."

Q. "She wrote her name there without anybody holding her hand I believe you said?"

A. "That is correct."

Q. "I notice just below her signature and down to the left, there are two words and two sets of figures as follows:

'Dated March 28, 1925' wrote?"

A. "Yes."

Within the statement itself was no date. After the execution thereof by the dying girl witness had written in ink "Dated March 28, 1925," at the bottom of the dying declaration. The cross-examiner intended to make as much of this as possible.

Q. "Who wrote that?"

A. "I did."

Q. "When did you write that?"

A. "As I remember now, I wrote that after I got back to the office, I am not sure, I told you in the bail hearing I was not sure, and I don't know, I don't remember."

Q. "I beg pardon, I am not inquiring about the bail hearing now; you think you wrote these words when you got back to the office?"

A. "I think that is it."

Q. "Did you write those words with the same pen that Miss Oberholtzer used to sign her name?"

A. "I don't remember."

Q. "Do you remember whether you used a fountain pen?"

A. "Yes."

Q. "And whose pen was it?"

A. "I said I don't remember."

Q. "You don't remember?"

A. "No, sir, I don't."

Q. "Did you have a fountain pen?"

A. "I had."

Q. "Did you have one with you when she signed that statement?"

A. "I imagine, I don't remember, I carried one."

Q. "But Mr. Dean furnished her a pen with which she signed her name?"

A. "That is the way I remember."

Q. "But you don't remember whether you used Mr. Dean's pen or your fountain pen when you signed that?"

The witnesses were separated so no one could hear the other's testimony. Consequently the smallest matters became important. If another witness should have testified for example that a pen and ink were brought from down stairs it would have injured witness' credibility.

A. "That is what I testified to."

Q. "And that was written at your office?"

A. "That is the way I remember, I can't be sure."

Q. "Now how long after she signed her name to this paper that you wrote these words?"

A. "If I wrote the words I would be glad to tell you, for I don't remember that time too definitely, if I did it would be very close to within an hour."

Q. "On the same day?"

A. "Yes."

Q. "I will ask you if you didn't testify on the bail hearing that you are not sure but that you wrote these words a day or two after she signed that?"

A. "I did not."

At the bail hearing witness had not clearly recollected regarding the exact time the date referred to had been written on the bottom of the statement. Mr. Inman brings out the record.

Q. "Now I will ask you if these questions were not asked you on the bail hearing when you were testifying under oath in this hearing, and if you didn't make these

answers: 'Did you write these words "Dated March 28-1925" before or after Miss Oberholtzer wrote her name?'

Answer: 'After.' 'How long after?' Answer: 'Well, it was right away, as I remember.' 'Right in the same room?' Answer: 'I don't—I don't remember whether I did it in the same room or outside, but I remember that it was right thereafter that I wrote these words.' Question. 'Was it written in the home of the Oberholtzers?' Answer: 'As I remember now it was written in the home of the Oberholtzers.' Did you make those answers to those questions?"

A. "Yes, sir."

Q. "'Question: It was not written in your office?' Answer: 'Not as I remember; that is a point that I have not tried to recollect; if it was written in my office I would be glad to tell you.' Did you make that answer?"

A. "I did."

Q. "I will ask you if this question was asked and if you made these answers: 'Who prepared this statement?' Answer: 'Mr. Dean and myself.' Did you make that answer?"

A. "Yes, sir."

Q. "Now, Mr. Smith, are you sure, sir, that Madge Oberholtzer wrote that name?"

A. "Yes, sir, she did."

Then followed in conclusion.

Q. "I will ask you if this question was not asked you when you testified under oath on the bail hearing in this case, and if you didn't make this answer: 'Who dictated these words to the stenographer?' (Referring to the statement.) Answer: 'Mr. Dean and myself.'?"

A. "Yes, sir, I said that, it was not right."

Mr. R. K. Kane. "What was that?"

A. "I said I made that statement, it was not right, I mean he was present with me."

Thus ended a vigorous cross-examination lasting some hours. The statement was subsequently offered into evidence and admitted as the dying declaration of the girl.

It is impossible to give all or even examples from all of the testimony of various witnesses for the State, the rendering of which lasted for weeks but here is an example taken from the testimony of Mrs. Josephine Lowes. It was she whose residence in Irvington abutted in the rear the railroad track which intervened between it and the Stephenson estate. Very early on the morning of March 16, 1925 she was awakened by a woman's scream coming from the direction of the Stephenson garage followed by the barking of dogs. This corroborated the dying declaration of Miss Oberholtzer.

Cross-examination of Mrs. Josephine Lowes.

Questions by Eph Inman.

Q. "Are you a married lady?"

A. "I am."

Q. "What is your husband's name?"

A. "Jesse E. Lowes."

Q. "What is his business?"

A. "He is Assessor."

Q. "He is an Assessor?"

A. "Yes, sir."

Q. "Township Assessor?"

A. "Yes, sir."

Q. "In Irvington?"

A. "Yes."

Q. "Is he a politician?"

Counsel was feeling around in the dark for something to leave an unfavorable impression upon the jury. The word "politician" seemed to strike his fancy.

The court sustained the objection of the State which is omitted.

Q. "Is he a party committeeman out there?"

The state objects.

The court overruled the objection of the state, to which ruling of the court the state, by its counsel, at the time took an exception.

A. "Well, now, that is a question I can't answer."

Q. "You don't know?"

A. "No; part of the time he is and part of the time he is not."

Q. "Part of the time he is and part of the time he is not?"

A. "Yes, so whether he is this year or not I can't tell you."

But to get to the substantial part of her testimony.

Q. "So the back of the garage is towards your house?"

A. "Towards the railroad, and we live, as I told you, northeast from the ——"

Q. "Yes; well, the railroad runs east and west frontage there?"

A. "Yes, and the garage is, as I say, about three hundred feet from our house, or near that, of course, I don't know the exact distance."

Q. "Three hundred feet?"

A. "Yes."

Q. "And the back of the garage is next to your house?"

A. "Yes."

Q. "So that you can't see the front of the garage?"

A. "No."

Q. "Don't you know—I beg pardon, I may not pronounce your name right, will you kindly pronounce it again?"

A. "Lowes."

Q. "How do you spell that?"

A. "L-o-w-e-s."

Q. "You say Mr. Stephenson had some police dogs?"

A. "Yes."

Q. "Where were those dogs?"

A. "Well, part of the time they would be about the house, part of the time he had dog kennels for them."

Q. "Dog kennels?"

A. "Yes."

Q. "And you say he had police dogs on his premises there on the 16th of March?"

A. "Well, the dogs barked, yes, and they were police dogs."

Q. "You don't know whose dogs they were?"

A. "Well, the dogs were there."

Q. "Don't you know as a matter of fact, Mrs. Lowes, that there had not been a dog on Mr. Stephenson's premises for at least a month before that time, don't you know that?"

A. "No; I know they were the same looking dogs there, the same kind."

Q. "Could you tell from the sound of the bark of the dog who was their owner?"

Mr. Remy. "Oh, the State objects to that."

A. "No, I could not tell that."

Q. "You don't know whether it was Stephenson's dog or dogs that belonged to somebody else, do you, Mrs. Lowes?"

A. "Well, they were dogs around there, that is all I know, and they looked like ——"

Q. "How many dogs ——"

Mr. Kane. "Complete your answer."

A. "And they looked like the same dogs that had been around there for almost a year."

Q. "How many different dogs did you hear bark?"
A. "Well, I could not tell you that, it must have been two different dogs barking."
Q. "Did you see them at the time?"
A. "Why no, it was the night."
Q. "Was it dark over there?"
A. "Well, I could not see the dogs, no doubt they were penned up."
Q. "Where was your room in which you were sleeping?"
A. "The southwest room."
Q. "Southwest room?"
A. "Yes."
Q. "And did you have windows in that room?"
A. "I have windows there, yes."
Q. "And did you have your windows closed?"
A. "One was raised."
Q. "Which one was raised?"
A. "The one to the west."
Q. "And was there one on the south also?"
A. "No."
Q. "Just one window in the room?"
A. "Oh no, there is three windows."
Q. "And was anybody else occupying that room with you that night?"
A. "Well, my husband was there."
Q. "What time did did you go to bed?"
A. "Well, it was after eleven."
Q. "After eleven?"
A. "Yes."
Q. "What day of the week was this?"
A. "That was Monday, the 15th—the 16th."
Q. "The 16th."
A. "Yes, sir."
Q. "How do you know it was the 16th?"

A. "Well, because I know it was the 16th."

The personality of this mother and housewife who had lived neighbors with the Oberholtzer family for many years precluded the defense attorneys from gaining head-way with this kind of questioning. Here is another example of knowing well the personality of the witness and its possible effect upon a jury. A question that would be most damaging to the credibility of one witness will rebound favorably to another.

Q. "That is the reason?"

A. "I do for a fact."

Q. "Now you say ——"

A. "The next morning was the 17th I know."

Q. "How do you know the next morning was the 17th?"

A. "Well, naturally, if one day was the 16th the next day would be the 17th."

Q. "Was that Friday night or Saturday night?"

A. "No, indeed, Monday and Tuesday."

Q. "Now Butler College is there close?"

A. "Well, quite a distance away; the College of Missions is closer."

Q: "Was Butler College in session during that time?"

A. "Think so."

Q. "Students were there in Irvington attending that college, were they?"

A. "Oh yes."

Q. "It was a very common thing to hear people at midnight around there, young boys and girls, students, in automobiles, and parties having good times, and yelling and screaming at the tops of their voices?"

A. "They would not be screaming in distress, would they?"

Q. "I didn't ask what they would be screaming, but what you heard?"

A. "Well, no, I will say right now I very seldom ever heard a woman, but the boys I used to."

Q. "The boys you used to?"

A. "Yes; not so much now."

Q. "You sometimes hear a woman's voice in passing automobiles?"

A. "Oh yes, but not like that."

Q. "Laughing and cutting up?"

A. "Not like that."

Q. "And did you ever hear, when the boys would yell out, or hear sounds from women, did you ever hear the dogs bark?"

A. "Oh yes, nothing unusual to hear those dogs bark."

Q. "Was your husband awake that night?"

A. "Yes, he was awake, he was awake and provoked."

Q. "I am not asking about provoked?"

A. "Well, I had to tell you."

In the beginning of the medical section of the State's testimony the foundation of its theory was rendered by Dr. H. O. Mertz in his answers to the following questions, given here without a recital of the interposed objections made by the defense or any reference to the remainder of his testimony. The question had just been asked by Charles E. Cox of the witness, what caused the death of Miss Madge Oberholtzer.

A. "She died from an acute infection, superimposed upon an acute nephritis, in my opinion."

Q. "What, in your opinion, was the nature of this acute infection, basing your opinion upon the same hypothesis that I asked?"

THE WITNESS. "May I ask a question?"

THE COURT. "Yes."

THE WITNESS. "Was it stated in the question that the staphylococci were found at both lesions?"

Witness refers to the long hypothetical question just propounded by the examiner which contained a complete review of the facts in evidence.

Q. "Yes."

A. "That she had staphylococci infection in her kidney."

Q. "What, in your opinion, Doctor, basing your opinion upon the same hypothesis, was the probability of her recovery from the mercuric poisoning, except for this infection?"

A. "I feel that she would have recovered from her nephritis."

Q. "The mercuric nephritis?"

A. "Yes, sir."

Q. "State, Doctor, what influence the delay in medical treatment had on her chance for recovery, that is, the delayed medical treatment for the poison?"

A. "It would allow more absorption of the drug and would result in greater damage to the kidney in all probability."

A portion of Dr. Virgil H. Moon's direct testimony for the State is here given to show more fully the evidence supporting the theory of the State relating to the medical elements of the case. Defendant's objections are omitted for the sake of brevity.

Direct examination.

Questions by Charles E. Cox.

Q. "Do you believe, Doctor, that Madge Oberholtzer would have recovered from the effects of the poisoning had she—that is, the mercurial poisoning, had she not been infected with virulent disease germs in the manner you have described?"

A. "I believe she would have recovered for the reason that the kidneys had already accomplished a large amount of repair, sufficient to carry on adequately the function of the kidneys, and hence that had some other complication not entered into the case, I believe recovery would have followed."

Q. "State to the jury the nature of that complication?"

A. "In the hypothetical case such as we described, and containing the features enumerated therein, the nature of the complication, as definitely indicated, is that of the blood stream infection, with some pus forming bacteria."

Q. "What, in your opinion, in such hypothetical case, would have been the probability of recovery from the mercuric poison, except for such infection?"

A. "In the hypothetical case such as described, recovery was definitely indicated by the progress of such case up until the time when the entrance of the complicated factor was described. The length of time elapsing between the taking of the poison and the onset of unfavorable symptoms was such that recovery was almost certain in the absence of the complication set forth or described in the hypothetical question."

Q. "And such an infected wound or area is produced by what cause, Doctor?"

A. "By the entrance of bacteria into that wound and the formation of the infection in the tissues about it."

Q. "State whether you made, or procured to be made, other examinations on the organs after the post mortem examination?"

A. "I did; I supplied portions of the organs to the chemist, Dr. Harger of Indiana University School of Medicine, for chemical examination, and I myself made

microscopic examinations upon various of the organs and tissues taken from this body."

Q. "Parts of what organs did you deliver to Dr. Harger for chemical examination?"

A. "Parts of the liver and kidneys."

Q. "What did you find through your own microscopic examination of the organs, Doctor?"

A. "I found that the injury in the kidneys had almost healed, there was very far advanced repair, and the destruction of kidney tissue resulting from the mercuric poisoning had in large measure been repaired."

Q. "What is the fact, Doctor, as to whether the repair had been sufficient in its progress to restore the functions of the kidneys?"

A. "There had been sufficient of repair process to restore a large amount of functioning, I would not say to restore the function completely to normal."

Q. "You spoke of the post mortem examination disclosing an abscess in the lung, will you state the characteristic of that?"

A. "Microscopically this abscess consisted of pus, as usually is found in abscesses; it also showed the presence of the germs which produced it, these were of the variety which we call staphylococci."

Q. "Pus forming germs?"

A. "Yes, sir."

Q. "In what portion of the lung was this staphylococci abscess?"

A. "It was in the outer portion of the lung, adjacent to the pleura, in the margin of one of the lobes."

Q. "How do such abscess in the lungs originate?"

A. "Such an abscess as this originates from a blood-borne infection. The bacteria which produce them are carried there by the blood stream."

Q. "And can you explain to the jury how this bac-

teria gets into the blood stream in the case of such an abscess?''

A. ''When a person has a suppurated injury, whether that be a boil or a carbuncle or an infected wound in which staphylococci or other bacteria are present, it very frequently happens that some of these bacteria get into the blood stream and are carried to other parts of the body where they set up secondary infection, producing abscesses or other forms of inflammation.''

Q. ''What is such condition called professionally, medically, Doctor?''

A. ''We speak of that condition as pyemia.''

Q. ''Do you know what the laity call it?''

A. ''Well, such an infection as this is sometimes spoken of by the laity as blood poison.''

Q. ''What clinical symptoms would be present in such conditions?''

A. ''There would be weakness, and a rapid pulse; there would be fever; the patient, in other words, would be sick.''

Q. ''In this particular case of Madge Oberholtzer, did your post mortem examination disclose any injury to her body which might have been the cause of this infection ——''

A. ''I found only one area from which such an infection could probably have originated.''

Q. ''Tell what it was?''

A. ''The lacerated and recently healed infection in the skin over one breast was the only one which I found from which such a pyemia as I have described could probably have resulted.''

Q. ''Could such injuries as you discovered be infected by the human teeth?''

Mr. Cox. ''Read the question, please.''

(Question was read to the witness by the reporter.)

A. "They could be, yes."

Q. "I may have asked this before: Did any of these marks on the breast show evidence of an infection having been present?"

A. "One of them showed very unmistakably; the infected wound which had recently healed."

Q. "Are wounds made by biting usually infected?"

A. "They are very apt to be infected."

Q. "In cases of biting by the human teeth where does the infection come from, Doctor?"

A. "Usually from the bacteria which are present upon the teeth and within the mouth of the individual who does the biting. There may be bacteria present upon the skin which are carried in by such injury and produce the infection."

Q. "Did you find bacteria in the lung abscess?"

A. "I did."

Q. "What kind?"

A. "Staphylococci."

Q. "Are such bacteria usually on the teeth and within the human mouth?"

A. "They are."

Q. "State where, in your opinion, the staphylococci found in the lung abscess in this case came from?"

A. "In my opinion the infection found in the lungs came from the infected areas, recently healed, in the skin on the chest."

Q. "State your reason for this opinion, Doctor?"

THE COURT. "Go ahead."

A. "I have already given my opinion, since this was an area which showed the presence of recent infection, and that no other infected area was found in a careful search of all the parts of the body, no other infected area was found from which such infection could probably have originated."

This direct testimony of the witness was the foundation stone of the state's theory that the staphylococci infection caused the death and that the victim otherwise would have recovered from the mercuric poisoning, and that in all recorded medical history no patient thus suffering, having survived longer than twenty-five days, died of the original cause.

Dr. Moon's cross-examination was conducted by Mr. Inman who attempted to show by illustrating to the jury how quickly bichloride of mercury dissolved in water and that it was not possible that Miss Oberholtzer's death could have been caused by anything other than her mercuric poisoning and that she could not possibly have recovered.

Cross-examination.

Questions by Eph Inman.

Q. "Would it throw any light upon the question, of this question that is before the jury, as to how quickly this sort of mercury tablet would dissolve in water if you had a glass filled with water and should drop this tablet into the water?"

A. "If the jury wish, I would be glad to show the test."

Q. "Now, Doctor, would you mind to take this glass in your hand?"

A. "No, I am not afraid."

Q. "That seems to be cold water?"

A. "It is water of average temperature."

Q. "Water a little warmer than that would dissolve the mercury tablet more readily than the cold water?"

A. "It probably would."

Q. "Would you mind, Doctor, if I would ask you to take this tablet, bichloride tablet, and drop it into the glass and then hold it up and let the jury see how quickly

it dissolves; just shake it a little?" (Witness takes the glass and drops a tablet in.)

Q. "Now state whether the tablet has dissolved and fallen to pieces?"

A. "It has not dissolved."

Q. "Not completely?"

A. "It has begun but has not dissolved."

Q. "It has fallen all to pieces?"

A. "The surface of it has disintegrated, but the amount of the tablet, ——"

Q. "How many seconds do you estimate that it has been since you dropped that into the glass of water until now?"

A. "Oh probably fifteen."

Q. "Do you think it has been as much as fifteen seconds?"

A. "I think so."

Q. "Now that tablet, when you move the glass, that scatters all over the bottom of the glass?"

A. "Yes, it remains in powder form on the bottom of the glass, mercury powder does, when dissolved, it will in a few minutes dissolve and that amount of powder is all there."

Q. "But that has all fallen to pieces and is a mass of powder all over the glass?"

A. "Yes."

Q. "And if that were not so full and you could shake the water, it would turn the color to green?"

A. "Yes, but it has not turned green, but it has not gone into solution."

Q. "If you could pour a little out and shake the water, so you would not spill it on your hand, Doctor." (Counsel takes the glass and pours some of the contents out and returns the glass to the witness.) "Now, Doc-

tor, would you mind to shake that a little, without taking a chance?"

(Witness shakes the glass.)

Q. "Now?"

A. "Yes, the form is coming up and is giving the water a little greenish tinge."

Q. "So when you drop the tablet into the glass of water, and in the course of a few seconds, if you shake the glass, it colors the water green?"

A. "As soon as it gets into solution the water becomes green."

Q. "So it takes, in fact, Doctor, but a very few seconds for it to dissolve in water?"

A. "The jury shall be the judge of the amount of time taken."

A very good answer. Nevertheless the cross-examiner's method of demonstration was a very effective method of visualizing before the average juror's mind the rapid dissolution of bichloride of mercury tablets.

Q. "Now, Doctor, assuming that you drop such a bichloride of mercury tablet into a glass of water, or say drop three of them into a glass of water at one time, and in the course of a few seconds shake it up, stir it up after the tablets have fallen to pieces and begin to scatter through the water and over the bottom of the glass; if you would drink that glass of water containing that dissolving tablet, these dissolving tablets, into your stomach, thereby throwing the whole mass into quick contact with the increased heat of the stomach, it would cause the dissolution to be accelerated, would it?"

A. "Probably would."

Q. "What was the immediate cause of the death of Madge Oberholtzer?"

A sudden and an abrupt turning to the real question before the jury. Counsel has just demonstrated in open

court where all might see the terrible activity of the poison; had drawn forth admissions of its deadly effect and nature from the great doctor. And then he asked with the abruptness of a cavalry charge what caused her death?

But the witness held his ground like a soldier.

A. "In my opinion the immediate cause of death was an infection carried through the blood stream, localizing in the lung and in the kidney, particularly in the kidney; that was the immediate cause; there were other and contributing causes."

Q. "After she had lived twenty-five days from the time she took the poison, to-wit: until April 11 say, it is your view that she should have recovered if complications had not set in, is that right?"

A. "If she had lived twenty-five days?"

Q. "Yes."

A. "That is my opinion, yes, sir."

Q. "That is your view of it. The fact that she was alive on the twenty-fifth after she took the poison, and that she died three or four days later, indicates to your mind, then, that complications set in and caused her death, is that right?"

A. "No, the fact that she lived does not indicate the complications, there were features."

Q. "Well, put the whole question together, Doctor?"

The Witness. "Will you read the question?"

(Question was read to the witness by the reporter.)

A. "That suggests the presence of the complication."

Q. "That suggests the presence of it?"

A. "Yes."

Q. "All right. Do you think the complications which you have in your mind set in about the twenty-fifth day or sometime within the three or four subsequent days that she lived?"

A. "I don't know when the complications set in."

Q. "Well, what is your opinion as to whether the complications that you speak of set in after the expiration of the twenty-five days and some days within the three or four days period since?"

A. "This maximum effect set in at that time, if you wish my opinion on the duration of this infection, does that ——"

Q. "No, I am just asking my question?"

A. "The maximum evidence of such complication came after the twenty-fifth day following the poison."

Q. "What would you regard as the minimum evidence, as contradistinguished from the maximum?"

A. "The minimum evidence would be such which the clinicist would not see or anticipate."

Q. "Could not even have told?"

A. "No."

Q. "So you would have to wait for some maximum evidence to develop before you could determine whether there were complications?"

A. "Sufficient evidence to call the attention of the clinicist to the fact that some other condition than mercuric chloride was in operation, yes, sir."

Q. "Do you know of a thing that developed in the life of this girl, after the twenty-fifth day of her life since taking the poison had elapsed, do you know of a thing after that twenty-fifth day, that developed which would indicate to your mind a maximum evidence of complication?"

A. "I only know, as was stated in the hypothetical question on which I gave an opinion, that there was a high leukocytosis, that there was a temperature ranging about one hundred and four degrees, that there was pus in the urine and that the patient was much worse. Those

facts as embodied in the hypothetical question are the basis for the opinion which I expressed."

The witness then proceeded to assert that modern medical experience had proved that a patient so suffering who had survived twenty-five days would not die from mercuric poisoning alone.

Q. "You don't mean to say there have not been cases which have not been reported?"

A. "The exceptional cases are those which the physicians report, and the exceptional cases get into the literature quicker than the average cases."

Q. "Do you say there is no exception to the rule that when a patient lives twenty-five days, under all reported cases, that the prospects are that the patient will recover?"

A. "I have never known of a case, nor have I found record in all my literature on that point, of a case which died following twenty-five days."

Q. "You have made some considerable research on this particular case?"

A. "I have."

Q. "And you have been in consultation with attorneys who are prosecuting this case?"

A. "Naturally I would lay the evidence which I was able to find before them."

Q. "Yes, sir, and you did that?"

A. "I did."

Q. "And they laid hypothetical questions before you, didn't they?"

A. "I think so."

Q. "And you knew in advance what your answer was going to be before you took this witness stand, and based upon the hypothetical question which the gentlemen over there laid before you?"

A. "I knew what my answer would be to any question

which I was able to answer pertaining to the nature of mercuric poison."

And then again after more questions and answers along the same line counsel for the defense returns suddenly to the bail hearing.

Q. "You were called here by the defense and put upon the stand as being one of the state's witnesses in that bail hearing, were you not?"

A. "One of the defense witnesses I believe."

Q. "I say you were called by the defense?"

A. "Yes."

Q. "I will ask you, Doctor, if I didn't put to you while you were under oath as a witness on the stand in that bail hearing, these questions, and if you didn't make these answers to me: 'Question. And then the initial cause, the cause that produced the succeeding complications and ultimately the death, the initial cause was the taking of the poison was it, Doctor?' "

A. "That was the answer because ——"

Q. "Wait a minute; and if you didn't make this answer to that question: 'Answer. Probably so; yes, in my own way I would state it that the conditions found in her body are the conditions which are found likely in the organs of those who have died by mercuric chloride poison.' Did you make that answer?"

A. "Yes, sir, that is exactly my answer."

Q. "And I will ask you if you didn't say this: Question, 'Well, that is what I am getting at, directly, finally that it was the poison, the taking of the poison that developed into and through the various processes that resulted in her death?' Answer, 'Probably'?"

A. "Yes."

Q. "You said that?"

A. "That was my answer."

Q. "And if I didn't put this question and if you

didn't make this answer: 'Now did you examine her body and surface of the body?' Answer. 'I did.' Question: 'Did you find some evidence of bruises or injuries of some kind of a physical nature?' Answer, 'Yes.' Is that right?"

A. "That is correct."

Q. " 'Question: State to the jury, Doctor, whether in your judgment, those physical injuries as reflected through the evidence found on the surface of the body in and of themselves were sufficient to produce the death of the lady?' Answer: 'I don't think they were.' Did you make that answer?"

A. "I did; in and of themselves they were not sufficient."

Mr. Inman. "I beg pardon, just answer my questions."

A. "I gave that answer."

Q. "Question: 'Is it your judgment that they did not produce the death?' Answer: 'That is my judgment.' "

A. "I said that; those injuries themselves did not produce the death."

Frequently some medical report hurriedly prepared not under oath for some transient purpose by some physician may on cross-examination become the source of great embarrassment. Comes now the witness' report to the coroner.

Q. "Doctor, you testified as a witness before the coroner in this case, didn't you?"

A. "No, I didn't."

Q. "You didn't?"

A. "No."

Q. "And made a report of the autopsy?"

A. "I believe I sent the coroner a copy of my autopsy notes."

Q. "I will ask you if, in your copy—in the copy of

the report that you filed with the coroner in this case, if you didn't make this statement: 'I have never seen a kidney having the characteristics present here, produced by any other agent than mercury'?"

A. "That is true."

Q. "You said that?"

A. "I said that: those kidneys are the effect of mercuric destruction."

Q. "And in speaking of the condition of the lung in your report to Dr. Robinson, the Coroner of Marion County, I will ask you if you didn't say this: 'Localized solitary suppurative pulmonary lesion—"

A. "Yes."

Q. "Possibly tuberculous?"

A. "Also the gross examination—"

Mr. Inman. "I beg pardon."

A. "I said they have gross examination on microscope report plates."

Q. "Yes; again I will ask you if you didn't enumerate certain things, and among them if you didn't say this, just as I put it: 'Localized solitary suppurative pulmonary lesion, possibly tuberculous'?"

A. "Yes, sir."

Q. " 'Menstruating uterus.' You made that report?"

A. "Yes."

Q. "Was that true?"

A. "I presume it was, there was found —"

Q. "Don't you know whether it was or not?"

Mr. R. K. Kane. "Let him answer."

A. "I stated that upon the report as —"

Q. "Well, was it true?"

Mr. R. K. Kane. "Wait, let him answer."

A. "My report embodies my opinion, it was my opinion that the uterus was menstruating."

Mr. Inman. "I beg your pardon."

A. "That is my report."

Q. "If you will just answer my question?"

THE COURT. "Don't lecture the witness, we will attend to that."

After further examination upon the subject of his report to the coroner the interrogation went directly to interest. The Doctor, the reader will understand was a State witness, who had been required to testify at the bail hearing in response to a summons for the defense.

Q. "Doctor, you expect to be paid for testifying here as a witness, don't you?"

A. "I don't know whether I will be paid or not."

Q. "You expect to be, don't you?"

A. "I hope to be; I hope my expenses will be paid any way; I have not even been assured of that."

Q. "How much do you hope to be paid?"

A. "I hope to be paid as much as my time on the witness stand would bring me were I at my place of business."

Q. "Well, how much would that be?"

A. "I don't know."

Q. "Why, you refuse to testify at all, Doctor, unless your fee is guaranteed, don't you?"

MR. R. K. KANE. "The state objects to that."

MR. REMY. "We will withdraw the objection."

A. "I usually charge one hundred dollars a day for expert testimony, and where that is in behalf of the witness I often ask it in advance."

Q. "In the bail hearing, when the defense called you as its witness to the stand, you said to me, standing right here, that you refused to take the witness stand unless I paid you one hundred dollars in advance; I said to you, Doctor, I would guarantee your payment, and you said, 'if you will give me your word and I will take your

word,' and then you testified and I did pay you the one hundred dollars?''

A. ''That is practically true.''

Mr. Inman. ''That is all.''

Whereupon Mr. Cox came in with an additional redirect examination with the following questions:

Q. ''I neglected to ask you, Doctor, I will now: Upon the facts involved, assumed yesterday in the hypothetical question put to you, what would be, on the subject mentioned in that question, the effect of from twenty-four to twenty-six hours' delay in administering the usual remedies for mercuric chloride poisoning?''

A. ''The effect of such delay would be to materially reduce the chances of recovery in such a hypothetical case.''

The foregoing was given at some length to enable the reader to thoroughly understand the tenor of the state's medical testimony.

The defense limited its evidence:

1. To a rebuttal of the medical testimony offered by the state, and attempted to show that the cause of the victim's death was suicide and that her life was ended by reason of the mercuric poisoning self-administered; that patients so suffering had lived much longer than twenty-five or thirty days and died from the original cause.

2. An effort was made to break down the dying statement of Miss Oberholtzer by attempting to prove by a few witnesses that she had met Stephenson before the Governor's ball. In her statement she had stated that this was her first introduction to him and if that could be proved to be false the credibility of her whole declaration would be weakened.

No other evidence to contradict the material allegations of the indictment was offered, the defendants de-

clining within their constitutional rights to take the witness stand.

An Indianapolis physician whose name will be omitted testified for the defense and in substance stated from the stand in response to hypothetical questions that in his opinion the victim in this case died from mercuric poisoning self-administered; he cited reputed cases where patients so poisoned had lived longer than twenty-five days and died, and stated that in fact they seldom recovered.

Cross-examination of Dr. S.

Questions by Charles E. Cox.

The first question asked him related to his acquaintance with Stephenson.

A. "I think I saw him once, I am not certain; I didn't treat him professionally."

Q. "Did you ever prescribe for him?"

A. "Yes."

Q. "How many times?"

A. "Oh three or four times I judge."

Q. "You said, Doctor, I believe, that you had had quite an extensive experience in these —"

A. "Fairly, yes, sir."

Q. "In poisoning cases, bichloride of mercury poisoning?"

A. "Yes, sir."

Q. "How many cases have you had personally?"

A. "Bichloride of mercury?"

Q. "Yes?"

A. "I have seen personally and in consultation, no less than thirty cases."

Q. "What was the character of those cases, Doctor?"

A. "Some, I think, were very profound, and some of them mild; most of them died."

Q. "Yes, and as to the way in which the poison was introduced into the stomach?"

A. "Most of them took it by mouth?"

Q. "Most of them?"

A. "Yes."

Q. "And how many of the thirty of your patients got well?"

A. "Most vaginal cases, nearly all cases will get well if you get them early, before absorption takes place."

Mr. R. K. Kane. "That is not an answer to the question."

Mr. Cox. "Yes, read the question to the doctor."

(Question was read to the witness by the reporter.)

Q. "And I will ask you to answer that question, Doctor?"

A. "I can't say definitely, but those that took it by the mouth, less than ten per cent. of them got well."

Q. "How many of them took it by the mouth?"

A. "I don't remember."

Q. "You have no recollection of that. Have you made any record of those cases?"

A. "Some of them I have a record of, and some of them I do not have."

Q. "And you have no recollection —"

A. "Those were al —"

Q. (Continued)—"of how many bichloride poisoning cases you had where they took the poison through the mouth?"

A. "At least twenty."

Q. "At least twenty?"

A. "Yes."

Q. "And what per cent. of them got well?"

A. "Not more than ten per cent. of them."

Q. "Not more than ten per cent.?"

A. "Two or three."

Q. "Two or three of them got well?"

A. "Yes."

Thus the questioning ran along this line until the cross-examiner turned at length to witness' direct knowledge.

Q. "Now, Doctor, you never saw Madge Oberholtzer, the dead girl, did you?"

A. "No, sir, not that I know of."

Q. "Had nothing to do with her illness or her treatment at all, did you?"

A. "None whatever, sir."

Q. "Didn't observe the autopsy held upon her dead body, did you?"

A. "No, sir."

Q. "Saw nothing of the conditions of the vessels?"

A. "Conditions of what?"

Q. "Of the organs of the body?"

A. "No, sir."

Having shown that only two of his patients out of twenty recovered and that he had no direct knowledge of the condition of Madge Oberholtzer the cross-examiner took another course for the purpose of testing witness' familiarity with medical literature.

Q. "Where did you read that any of those cases was when the stomach was full, where did you?"

A. "Well, for instance, I read Blair, an English Toxicologist, he is the—I read Solomon, I read Bosider and Wood."

Q. "And did you read that in Witthouse?"

A. "Woods, Clark, Landers, another English Toxicologist, Milt, etc., etc."

Q. "You have read those within the past two or three weeks?"

A. "Not all of them."

Q. "Most of them?"

A. "Yes."

Q. "Before the last two or three weeks when did you read a work on toxicology relative to bichloride of mercury poison?"

A. "Six weeks ago."

Q. "Six weeks ago?"

A. "Yes."

Q. "After you talked with Inman?"

A. "No, sir."

Q. "You had been informed you were to be called as an expert in this case?"

A. "I was not; knew nothing about it."

Shortly thereafter in response to some question the witness cited a case of one who, suffering from similar mercuric poisoning, had lived longer than Madge Oberholtzer and died. The questions continued.

Q. "Where did that death occur?"

A. "I beg pardon?"

Q. "Where did that death occur?"

A. "It occurred in England I understand."

Q. "And how did you learn of that Doctor?"

A. "I read it in Blair's Toxicology."

Q. "And what all does Blair say about that?"

A. "He just outlined that as the length of time that they may live."

Q. "Well, does he mention any particular case?"

A. "Yes."

Q. "And what does he say about that particular case?"

A. "He says it lived forty-one days after the lethal dose of bichloride of mercury."

Q. "Does he describe the condition under which he took it and how he was treated?"

A. "As the context of the description it was not necessary to describe that in detail, but he merely mentions that as the longest time."

Q. "Well, you were familiar with Witthouse's book?"

A. "No, I don't know anything about it."

Q. "Oh I thought you did?"

A. "No, I didn't make that statement, I don't know anything —"

Q. "You don't know anything about Witthouse's book at all?"

A. "No."

Q. "Do you know whether Witthouse is a recognized authority on toxicology?"

A. "I don't know anything about it."

Q. "And don't you know, Doctor, that that book reports five hundred sixty-five cases running from 1879 to 1910 which were treated in hospitals, well authenticated cases, don't you know that?"

A. "I don't know whether Witthouse is a law book or some other kind of a book, I don't know anything about it."

Q. "And you say you don't know he reports five hundred sixty-five cases?"

A. "That is what I said, three times."

Q. "And that three hundred and two of them only were fatal?"

This witness' examination extended for so long a time that only a small proportion can be given. Here follows further interrogation relative to medical and authorities cited by him.

Q. "You spoke of your familiarity with Blair?"

A. "Yes."

Q. "How many cases of mercuric poison does Blair report, Doctor?"

A. "I believe thirty-six, I believe in the article I referred to, in the chapter I referred to."

Q. "Just thirty-six?"

A. "Yes, sir."

Q. "Well, that was the chapter in his toxicology which related to mercuric poisoning, was it not?"

A. "Yes, sir."

Q. "And then that reported all of the cases that he mentioned in his article on mercurial poisoning, thirty-six cases, is that right?"

A. "No, I can't say that."

Q. "Well, how many more than thirty-six did he report?"

A. "He reported thirty-six individual cases."

Q. "No more than that?"

A. "No, his text is a general text on toxicology."

Q. "How many of the thirty-six recovered?"

A. "That was thirty-six cases of death that he reported; sixty-one per cent. of those died between the first and eleventh day; thirty-nine died up to the twenty-fourth day."

Q. "Then as I understand you, you were referring merely to the thirty-six cases of death?"

A. "That is what I referred to."

Q. "How many cases in all did he report?"

A. "I don't recall."

Q. "Oh you have no recollection of that at all?"

A. "No."

Q. "Then you have no knowledge of the percentage of recovery in the cases reported by Blair?"

A. "No, sir."

Q. "Have you any knowledge at all, Doctor, as to whether the percentage of fatalities as stated by Blair was ninety per cent. or more or less?"

A. "He says sixty-one per cent. specific—no, one per cent. of what he —"

Q. "How is that?"

A. "This paragraph merely dealt—that I have in

mind, merely dealt with the time of death after taking the bichloride."

Q. "And you read nothing in Blair about the percentage of recovery?"

A. "Not that I recall."

Q. "And, Doctor, you are testifying here as an expert?"

A. "Theoretically."

Q. "And after losing ninety per cent. of your mercurial poisoning cases, you consider yourself an expert?"

A. "Circumstances —"

Mr. Cox. "That is all."

A. "Circumstances alter cases."

But on a day following Doctor S. was suddenly recalled by the state for further cross-examination.

Ordinarily such procedure is ill advised. This, however, is an exception that proves the rule, and where an exception occurs, if properly handled, it usually becomes a master stroke. Heretofore in this volume the rule is laid down that it is nearly always unwise to bring back a witness after he has been discharged. Be prepared to finish with him all at once and if omitted questions are later remembered by the examiner let them go. This is ordinarily the better course.

The splendid continuation of this cross-examination hereinafter shown will fully demonstrate to the reader that the advantage of an exception to this rule, if properly taken, is a great one.

Cross-examination of recalled witness.

Questions by Charles E. Cox.

Q. "You are the same Dr. S. who was on the stand yesterday or day before?"

The Court. "Yesterday."

A. "I believe so, yes, sir."

Q. "Doctor, since you testified have you talked to anybody about your testimony in this case?"

A. "Yes, been a few people up to the city spoke to me about it this morning."

Q. "Did you talk to anybody last evening about it?"

A. "No; I might have talked to two or three people."

Q. "Do you remember the names of those two or three people you talked to about it?"

A. "Yes, I—Dr. L., my office associate, said something to me about it, and several people joshing me about it."

Q. "No other doctor, did you talk to no other doctor yesterday with reference to this case?"

A. "No, I don't know, there was two or three on the floor there said something about it, Dr. L."

Q. "You know Dr. J. W. W.?"

A. "No, I don't know Dr. W., I know Dr. L. W."

Q. "You don't know J. W. W.?"

A. "Not to my knowledge."

It is dangerous for a witness thinking his ordeal on the stand is over to go out especially while the trial is still in progress and express himself too freely. Frequently because of such indiscretions cases have been won by the adverse parties.

Q. "A young doctor who has been practicing about five years?"

A. "No, I don't know him."

Q. "Never saw him?"

A. "Not to my knowledge."

Q. "And he has not talked to you since your testimony and particularly he didn't talk to you yesterday after you went back, or last night, anything about the medical testimony in this case?"

A. "If a doctor talked to me by that name I don't

know him, I don't know this Dr. W. you speak of; Dr. L. W. is the only one I know in Indianapolis; there is another Dr. W.—no, it is W.; Dr. L. W. is the only doctor I know of in Indianapolis by that name."

Q. "And you have no recollection of a tall, dark complexioned, dark colored hair, young doctor talking to you?"

A. "If he was a doctor I didn't know it."

Q. "Well, did anybody of that description talk to you yesterday or last evening, about it?"

A. "No, sir."

Q. "Doctor, you told us yesterday about some of the authorities on toxicology which you had seen and were acquainted with and had looked into; see if I have the names right; you gave us the name of one Blair's Toxicology?"

A. "Yes, sir."

Q. "And Solomon?"

A. "Former Toxicologist?"

Q. "Yes, sir, Solomon; and Bassider?"

A. "Bassider."

Q. "And Woods?"

A. "Woods, yes, sir."

Q. "And Clark?"

Note that the cross-examiner is covering the old ground of the previous day and is causing witness to re-emphasize his citations of authorities.

A. "No, I don't recall that."

Q. "Landers?"

A. "Landers."

Q. "That is an English work?"

A. "Yes, sir."

Q. "And where is, or where was Blair published?"

A. "In London."

Q. "When?"

A. "I think this last edition, if I recollect it rightly, is 1906."

Q. "It is Blair's Toxicology?"

A. "Yes, sir."

Q. "Now, Doctor, as a matter of fact, it is Blythe's?"

A. "Yes, that is correct."

Q. "Blythe?"

A. "That is right, Blythe."

The trap set by the cross-examiner the preceding day has at last been sprung. Of course the printed record can not convey to the reader the effect in the courtroom. Here was a doctor citing medical authorities—giving one by its wrong name.

Q. "Blythe?"

A. "Yes, sir."

Q. "When did you see that, Doctor?"

A. "Saw it last night, and this morning, and a week or the last ten days."

Q. "You saw it before you testified?"

A. "Yes, sir."

Q. "Where did you get it?"

A. "Another doctor loaned it to me."

Q. "Who was the other doctor?"

A. "I don't know who it belongs to."

Q. "I didn't ask you that, Doctor; who was the doctor that brought it to you?"

A. "I don't know—do I have to answer that, Judge; this involves a matter in the city there that perhaps would not do any good."

By The Court. "Well —"

A. "I don't think this man wants his name mentioned."

The Court. "It might be very essential, doctor, to know; I would not want to say why it would be essential, but it would be an entirely proper question."

Nothing worse for the defense nor better for the prosecution could have occurred. Already it appears there is something to hide, however immaterial.

THE WITNESS. "Do I have to answer that point?"

THE COURT. "Yes, you will be required to answer."

A. "Dr. F."

Q. "Dr. F.?"

A. "Yes."

Q. "Where is his office?"

A. "He does not have an office; he lives up—he lives some where on the north side, I can't quite tell you where he lives."

Q. "What is his first name?"

A. "I don't know that."

Q. "Did you ever see him before?"

A. "Oh yes, I don't —"

Q. "What kind of a looking man?"

A. "He is a tall, dark headed fellow."

Q. "Practicing medicine?"

A. "Not much."

Q. "Has he ever practiced medicine much?"

A. "I understand so."

Q. "Do you have any knowledge of him personally?"

A. "I have seen —"

It is revealed by the cross-examination that the defense medical expert has been aided in securing the necessary information from which to testify and render an opinion by a doctor without an office.

Q. "How old a man is he?"

A. "He is about forty years old; yes, I have seen patients with him in consultation."

Q. "How did he happen to bring this book to you?"

A. "I asked him for it."

Q. "Was it his own book?"

A. "I can't say as to that."

Q. "How long ago was it?"

A. "About a week or ten days ago."

Q. "Do you know whether it was a book that had been borrowed from Dr. Harger?"

A. "No, sir, I know and know positively."

Q. "You don't know?"

A. "I know positively that it was not."

Q. "Dr. W., whom I have asked you about, didn't bring the book to you?"

A. "He did not; I don't know this Dr. W.; he might have talked to me, but I don't know any one by that name, any physician."

Q. "And if any one had talked to you and brought this book to you, you would know?"

A. "I would know if it was another physician, certainly would."

Q. "Doctor, you said you had practiced medicine in Indianapolis for how long?"

THE COURT. Don't repeat anything; that was gone over the other day."

A. "I graduated in 1908; I spent —"

THE COURT. "I think that may go out, we will not repeat anything, gentlemen."

Q. "Did you ever attend a veterinary school, Doctor?"

With the word "veterinary" the courtroom pricked up its ears. A veterinary doctor would hardly qualify as an expert in toxicology as it relates to human beings. Here was a case where the cross-examiner let the witness go and then suddenly called him back for a complete exposure.

A. "No, sir, I taught pharmaceutics and toxicology last year in Indiana Veterinary College, professor."

Q. "You have some veterinary remedies?"

A. "No, I am not altogether a 'hoss' doctor."

Q. "Will you please answer the question?"

A. "What do you mean?"

A. "Nearly all medicines used in human medicine are used —"

Mr. R. K. Kane. "Answer that question."

A. "What do you mean by that; you mean in my talk?"

Q. "If it will make it clearer, you have some veterinary medicines and remedies that you have gotten together, have you not, for sale?"

A. "I have not."

Q. "Have you ever had any connection with the Standard Veterinary Remedy Company?"

A. "Yes, about ten—eight or ten years ago, Dr. M., who is a veterinarian, was at that time, wanted to put some veterinary remedies on the market, but nothing was ever done, all that was done the name was filed over with the clerk, nothing was ever done, nothing else."

Q. "You advertised, did you not?"

A. "We started to advertise."

Q. "I hand you paper marked State's Exhibit No. 11, Doctor, and I will ask you if that is one of your advertisements?"

A. "That is one that Dr. M. got up, yes, sir."

Q. "And you were connected with that concern?"

A. "Yes, sir, we filed the name in the clerk's office in Indianapolis."

Here the State attempted to introduce the pamphlet advertising Standard Veterinary Remedies. After objections it was excluded by the Court but the effect reached the jury.

Q. "I will ask you, Doctor, if, among the other remedies which the Standard Veterinary Remedy Company, of Indianapolis, Indiana, United States of America, advertised, was a tonic or reconstructive for all run-down

conditions, especially following distemper, influenza and lung fever; causes the hair to shed more rapidly and the new hair to grow with beautiful luster; it aids digestion and restores vigor. Skin affections, chronic diarrhoea and chronic cough. One dollar with the order?''

Objection sustained.

Q. ''I will ask you, Doctor, if the advertisement of the Standard Veterinary Remedy Company didn't advertise a Standard Eye Remedy?''

A. ''No, sir, it done nothing, advertised, the plates were made.''

Q. ''I will ask you if it didn't advertise Standard Blemish Remover?''

A. ''I don't know what was done through M.''

By this time the Doctor, however splendid his reputation in other fields, was completely discredited before the jury as a specialist in toxicology whose opinion should be given weight as against such leaders as these medical experts presented by the State.

But the cross-examiner does not stop at that. To continue:

Q. ''Again let me ask you, Doctor, you spoke, if I remember correctly, of another authority on toxicology called Milt?''

A. ''Yes, sir.''

Q. ''Where was that published?''

A. ''That was in New York.''

Q. ''When?''

A. ''This edition I think was in 1910 that I have reference to.''

Q. ''When did you read that?''

A. ''I have seen it every day for the last two years.''

Q. ''How large a book is it?''

A. "It is a book of about five hundred pages, I think."

Q. "Is it standard?"

A. "Yes, sir, it is."

Q. "Recognized as standard?"

A. "It is."

Q. "And is a human or domestic animal toxicology?"

A. "It is the same, does not matter whether it refers to human or animals; all experiments are done on animals; this happens to be a veterinary book."

This admission is the last straw. But now to attack the defendant, Stephenson himself, and to show the witness' relationship.

Q. "You told us yesterday, as I recall, that you never had treated the defendant Stephenson in his home in Irvington?"

A. "That is what I said, yes, sir."

Q. "But you said you had prescribed for him?"

A. "Yes, sir."

Q. "Where?"

A. "At two or three of the hotels; and then one time, I have forgotten the address, it was on Meridian Street some place."

Q. "Never at any hospital?"

A. "I saw him once at one hospital."

Q. "Which hospital?"

A. "The Methodist Hospital."

Q. "How many different times did you treat him for delirium tremens or the effect of it?"

Objection sustained.

Q. "What is the fact as to whether you ever did treat him for delirium tremens or alcoholism?"

A. "I can't say that I ever treated him for delirium tremens."

Q. "Did you ever treat him or prescribe for him for alcoholism?"

A. "Not alcoholism alone, no."

Q. "For alcoholism in part?"

A. "Yes, one time he was a little nervous and been losing a lot of sleep, and he might have had a little alcohol, I don't know, I didn't see him take any."

Q. "You say not alone, Doctor, what else."

A. "Loss of sleep and over-work and exertion, etc., nervousness."

Mr. Cox. "That is all, Doctor."

The medical testimony of Dr. J. D. M. which followed may be disposed of in short order by portions selected from his cross-examination.

Cross-examination.

Questions by Charles E. Cox.

Q. "Dr. M., the character of the questions which the state will ask you may depend somewhat on your answer to the question which I shall now ask you: Do you wish your testimony here to be regarded as that of an expert witness on bichloride of mercury poisoning, or merely as that of a physician and surgeon engaged in the general practice?"

A. "I expect that to be merely as a physician and surgeon engaged in the general practice."

Q. "You have no special claims to expert knowledge as a toxicologist, Doctor, as I understand it?"

A. "Not as a toxicologist, no."

Q. "And while you know, of course, something about pathology, you make no claims to being an expert pathologist?"

A. "I do not."

Q. "Doctor, will you tell us, please, just what a slight abrasion of the skin is?"

A. "A slight abrasion of the skin would mean where

there is a dentation of the epidermis, cutting down and exposing some of the serum without the blood."

Q. "And that is a sort of a rasped injury in the skin that does not go down to the blood but does go to the serum?"

A. "That is what we call a slight one."

Q. "Yes, that is what I am asking about. Now, Doctor, will you also tell us what an incised wound is?"

A. "An incised wound is one which penetrates clear through the skin."

Q. "And brings the blood?"

A. "And brings the blood, yes."

And then again:

Q. "Do you know any of the defendants, Doctor?"

A. "No, I do not."

Q. "Doctor, what is a sadist?"

A. "Sadist? It is a moral pervert."

Still later:

Q. "And, Doctor, if they could of prolonged her life by giving her help —"

A. "They could have prolonged her life and they did prolong her life."

Q. "And if that medical attention that she received after she got home had been given her twenty-four hours before, her life might have been still further prolonged, might it not, Doctor?"

A. "It may have."

Q. "And, Doctor, if the staphylococci infection was introduced into the patient's system by a bite of the man in the berth with her, and that staphylococci infection had caused the high temperature, the pus in the blood which the fighting soldiers of the blood were called into service to overcome, and which caused the abscess in the lower lobe of the lung, that might have been an instrument in shortening her life, might it not?"

A. "It might have, yes, sir."

This admission supports one of the chief theories of the state's case.

It had been one of the contentions of the defense medical witnesses that bichloride of mercury tablets manufactured by Eli Lilly and Company were only white in color and that said company could be accepted as an authority upon same and upon the treatment of poisoning therefrom; that further an empty stomach such as the victim in this case had at the time of mercuric poisoning was a disadvantage and that the coffee drunk by her accelerated the action of the mercury.

Here is the brief portion of the examination of Dr. J. J. W. who testified for the defense as just outlined.

Cross-examination.

Questions by Charles E. Cox.

Q. "Doctor, Mr. Inman showed you a bottle of Lilly's bichloride of mercury tablets, or blue or green tablets. I will hand you State's Exhibit No. 9 and ask you to state to the jury whether that is a bottle of Lilly's bichloride of mercury tablets; pour some of them out, if you please, and look at them?"

A. "Unfortunately I have never seen these before."

Q. "Never seen these before, and yet —"

A. "No, sir."

Q. "—and yet you said Lilly made white ones?"

A. "I stated that companies made white, gray and blue; not Lilly."

Q. "Read from the label?"

A. "That says 'Eli Lilly'."

Q. "That is Lilly's, Eli Lilly's label, is it not?"

A. "Yes, but these —"

Q. "Now is there an actual antidote, or merely remedies for bichloride of mercury poisoning?"

A. "That depends upon what you mean by antidote and remedy."

Q. "Well, in the strict definition of the antidote, is there any real antidote for bichloride of mercury poison?"

A. "There is no real antidote for mercuric bichloride poison."

Q. "But they have come to call certain remedial agents preventive agents, that is, preventing absorption, have they not, and call them antidotes, Doctor?"

A. "If you consider an antidote, yes."

Q. "Read from the label, please, what it says under the head of antidote; read it out?"

A. "Give whites of eggs, flour or starch mixed with water; emetics of mustard. Give strong tea or coffee, stimulants, whiskey, etc. If needed afterwards, demulcent drinks. That is under antidotes."

And then further questioning as to whether he had ever treated patients suffering from bichloride of mercury poisoning.

Q. "How many of those were your own cases?"

A. "I have treated ten cases."

Q. "How many of them got well?"

A. "Two."

Q. "Two out of the ten?"

A. "Two of the ten."

The second portion of the defense theory of attack was to prove that Miss Madge Oberholtzer had known Stephenson before the Governor's ball held early in January, 1925, which was the time, according to her statement, of her first introduction to him and that she had been seen in his company at other places than those named in her said declaration. "If false in one, false in all" is an ancient truism of the law. Therefore one sentence of the girl's signed story sufficiently broken

down as a deliberate untruth would have damaged the whole.

Several witnesses testified to support this contention of the defense. Two, one V. B. A. and another C. L. C. stated they had seen her in Columbus, Indiana, with Stephenson early in January, 1925, in an automobile in the evening.

Space will allow but brief portions of their cross-examination. First comes that of C. L. C.

Cross-examination.

Questions by William H. Remy.

Q. "You say you are a chiropractor?"

A. "Yes."

This is a good beginning. The jury has been undoubtedly influenced by the atmosphere surrounding the medical experts of the state; then came a professor from a veterinary college testifying against them, and now a chiropractor, even though he is testifying to alleged fact and not as an expert.

Q. "Are you a graduate of any school?"

A. "University of Pennsylvania, Pittsburg."

Q. "When did you graduate there?"

A. "In 1921."

Q. "Are you sure that is the year you graduated?"

A. "Yes."

Q. "Where did you live at that time?"

A. "You mean my parents' home, while I was single?"

Q. "Yes."

A. "My parents lived at Lebanon, Indiana."

Q. "And where did you live?"

A. "I lived with my parents except when I was in school."

Then having established his residence and that he was married, his relationship with Stephenson was shown.

Q. "You have known Stephenson for three years?"

A. "Practically three years."

Q. "Where did you first meet him?"

A. "In Indianapolis."

Q. "Where?"

A. "At a meeting out on College Avenue, I believe."

Q. "And how frequently did you see him after you met him?"

A. "Oh it varied, at first after I had met him I didn't see him very often, maybe every two or three months; then later on I saw him perhaps as often as an average of once a week."

Q. "On what occasions would you see him once a week?"

A. "When I would have business to transact, talk over with him."

Q. "What business did you transact and talk over with him?"

A. "Political matters."

Q. "Were you a politician?"

A. "No, sir."

Q. "You are not a politician; what political matters did you have in hand that you talked over with him?"

A. "I was very much interested in getting a bill through the legislature or helping, doing what I could, to legalize chiropractics in the state."

Q. "Did you get your bill through?"

A. "No, sir."

Q. "Did Stephenson assist you in presenting your bill?"

A. "I don't know, we talked about it, my impression was he would help us if there was any way he could."

Later referring to the night he claimed to have seen Miss Oberholtzer with Stephenson.

Q. "Now Doctor, if you are a doctor?"

A. "I am not."
Q. "You are not a doctor?"
A. "Not in Indiana."
Counsel continues to keep the witness in as unhappy a light before the jury as is possible.
Q. "Where had you been on this particular night?"
A. "We had been to a meeting."
Q. "A meeting, was that a regular meeting?"
A. "I don't remember, we had meetings pretty often along there."
Q. "Well, did you have an organization at your meeting?"
A. "Yes, sir."
Q. "Have a secretary there?"
A. "Yes, sir."
Q. "Have minutes?"
A. "Yes, sir."
Q. "Do you recall any of the business transacted at that meeting?"
A. "No, I don't; I don't recall what meeting it was."
Q. "You don't recall anything of that?"
A. "This might have been one of the meetings just held by committees, I don't remember."
Q. "Now, Doctor, if you were to go back and consult the records you could fix the time definitely?"
A. "I don't know that I could."
Q. "Did you try to do that?"
A. "No, sir, there was —"
Q. "You have not tried to do that?"
A. "No, sir."
Q. "You could have ascertained, could you not, what night it was you saw Madge Oberholtzer by the night you came from this meeting?"
A. "I know it was the night I came from that meeting."

Q. "But you don't recall what night the meeting was on; now who else was at that meeting?"

A. "I don't remember; I just know we had come from the hall."

Q. "You don't remember any one that was at that meeting?"

A. "No, sir, I don't remember even what meeting we had been to; I know we had been to the hall to a meeting, but we had meetings practically every night of the week."

Q. "Had meetings every night?"

A. "Yes."

Q. "And you don't recall any one that was there on this particular night?"

A. "No, I don't."

No definite date had been set by his testimony as to when this alleged meeting of Stephenson took place excepting that it was early in January, 1925. He then testified he had forgotten all about the incident until "just awhile back."

Q. "You had forgotten all about it?"

A. "I had not thought any more about it since the time."

Q. "Who refreshed your memory, Doctor, as to this meeting and these occurrences on this particular night, after you had forgotten all about it?"

A. "A man came to Columbus to ask if we had met Miss Oberholtzer at Columbus."

Q. "Who was that man?"

A. "I don't know his name."

Q. "Don't know who he was?"

A. "No."

Q. "Describe him?"

A. "He talked to Dr. A., and Dr. A. called me and told me about it, and said this man was —"

Mr. R. K. Kane. "Not what A. said."

Q. "Now you didn't see the man yourself?"

A. "No, I never saw him personally."

Q. "You didn't talk to him at all, didn't see him?"

A. "No."

Q. "So that man didn't refresh your recollection about this any?"

A. "Well, he was the cause of my recollection being refreshed."

Q. "He was the cause of your recollection being refreshed. Well, as a matter of fact, wasn't it A. that refreshed your recollection about the thing?"

A. "He is the one who told me about this man coming."

Q. "Yes, he is the one that told you about it? Now did you ever afterwards talk to any one about that?"

A. "After what time?"

Q. "After you and A. had talked it over and you had refreshed your recollection after you had forgotten all about it?"

The Witness. "Now you want me to tell whether or not we had talked about this particular night, or about this man coming down?"

Mr. Remy. "I want you to answer the question."

Q. "Did you talk it over with any one else after that?"

A. "No."

C.'s corroborating witness, V. V. A., who testified next, was cross-examined by Ralph K. Kane.

Cross-examination.

Questions by Ralph K. Kane.

Q. "Did you have occasion to visit Stephenson's office frequently?"

A. "I did, yes, sir."

Q. "About how frequently?"

A. "Well, when I first went in to the Klan work it was practically every ten days or two weeks; then I didn't see anything much of Mr. Stephenson until about two years ago."

Q. "About when?"

A. "About two years."

Q. "About two years; when did you first go into the Klan work?"

A. "It was in May; I could not say which year."

Q. "What year?"

A. "Could not remember that."

Q. "Don't you remember the year you went into it, yet you were the district manager?"

A. "I took the —"

Q. "Was it in 1924?"

A. "No, sir."

Q. "Nineteen twenty-three?"

A. "No."

Q. "Nineteen twenty-two?"

A. "It was either twenty-one or twenty-two."

Q. "Well, which was it now?"

A. "I could not say."

Q. "You can't say when you began to work, to take up the Klan work as a district manager?"

A. "I took the work up as county organizer —"

Q. "Well, when?"

Mr. Christian. "Let him tell you."

A. "Several months —"

Q. "When?"

A. "Two or three months after May; I joined the Klan in May."

Q. "Of what year?"

A. "I can't say, I don't know."

Q. "You don't know what year?"

A. "No, sir, I am not clear."

Q. "Do you mean to say that you are so absent-minded that you are unable to tell the year in which you took up that kind of work when you were the organizer in Bartholomew County?"

A. "It was in 1921 or 1922."

Q. "That is as near as you can state it, is it?"

A. "It is as near as I can say truthfully, as near as I can say clearly and truthfully."

Q. "Well, just leave the truthfully out of it and let it stand on the clearly proposition?"

Mr. Holmes. "No."

The Court. "No, gentlemen."

A. "Clearly and truly."

Q. "So that in fixing the date of a matter of that kind, where you were taking up a special work and in charge of the whole county, you can't fix it more definitely than some time within a period of twenty-four months, is that right; just answer that yes or no, will you?"

A. "I took up the —"

Q. "Just answer the question yes or no?"

The Court. "If you know?"

Mr. Inman. "No."

The Witness. "I told him I could not, Judge."

Q. "Now they put you out of the Klan afterwards?"

A. "They did not."

Mr. Holmes. 'The defendants object."

Q. "How often—you say you had occasion to see Stephenson about every ten days; for what length of time?"

A. "I did."

Q. "For what length of time?"

A. "For about nine months."

Q. "During that year?"

A. "When was the big election that the Klan won so overwhelmingly?"

Q. "I don't know, I am not on the witness stand."

Remarks of counsel intervened.

THE WITNESS. "What is the question?"

THE COURT. "Read the question, Miss Dale."

(The question was read to the witness by the reporter.)

A. "In 1922."

Q. "Nineteen twenty-two; well, now you think you can fix it a little more definitely, do you, that you visited him about every ten days for nine months in 1922?"

A. "After election."

Q. "Well, 1922?"

A. "Was that the election?"

Q. "I am not testifying."

THE COURT. "Don't ask him questions, just answer."

A. "Well, I will have to qualify that."

Q. "Just answer the question as I asked it?"

A. "If the elections were in 1922, it was."

Q. "Well, was it or was it not in 1922?"

A. "If the elections are even years, it was."

Q. "Is that as definite as you can answer the question?"

A. "It could not have been any other time."

Q. "Well, then why don't you answer me instead of hedging around on the thing?"

MR. HOLMES. "The defendants move the Court to strike that out."

The court sustained the motion of the defendants to strike out the question, to which ruling of the court the state, by its counsel, at the time took an exception.

MR. HOLMES. "That is not proper."

THE COURT. "I have ruled on the question."

Q. "Why don't you give me a direct answer to the question?"

A. "Nineteen twenty-two."

Q. "Now you have finally fixed it about 1922; now why didn't you do that in the first place?"

The concluding example goes to discredit the witness generally.

Q. "You are not a member of the Klan?"

A. "No, sir."

Q. "You resigned, did you?"

A. "I resigned."

Q. "And when did you do that?"

A. "I was in good standing until the first quarter."

Q. "I didn't ask that question; I asked when you resigned?"

A. "When my dues run out."

Q. "Well, when was that?"

A. "The first quarter of this year."

Q. "Did you resign by request?"

A. "I did not."

Q. "Now at what period of the quarter did you resign?"

A. "I just quit going."

Q. "I thought you said you resigned?"

A. "Well, when your dues lapse and you quit going, what's the difference?"

The cross-examiner having shown his Stephenson and Klan relationship turned his attack upon the witness' inspiration for coming to testify.

Q. "Now who did you talk to about this matter the first time and when was it?"

A. "Three or four months ago."

Q. "Who did you talk with?"

A. "There was some fellow came in to my office."

Q. "Well, who was he?"

A. "I could not say."

Q. "Didn't you know him?"

A. "I did not."

Q. "Came in to talk to you about this case?"

A. "He said he was —"

Q. "I didn't ask you what he said; I asked you if he came in to talk to you about this case?"

A. "That is the way it ended."

Q. "And was that the purpose of his visit, to talk to you about this case?"

A. "It was."

And then later:

Q. "Did he tell you who he represented?"

A. "Mr. Holmes."

Q. "Was that his name?"

A. "Well, that is who he represented."

The cross-examination of Ralph E. Rigdon, a large, forceful man from Fountaintown, Indiana, resulted in some fireworks in the courtroom which can not be properly displayed upon the printed page. He, too, was brought in to testify that he had seen Miss Oberholtzer with Stephenson at other times than those included in her statement. His cross-examination speaks for itself. In the beginning he stated that in 1924 he had solicited funds for the Republican State Central Committee.

Cross-examination.

Questions by Ralph K. Kane.

Q. "Did you do anything else besides solicit money for the state committee?"

A. "That was practically my position."

Q. "During all that time?"

A. "Yes."

Q. "Were you paid a salary or a commission?"

A. "I was paid a salary."

Q. "Now what was your business before you went with the state committee?"

A. "Salesman."

Q. "What were you selling?"

A. "Stocks and bonds."

After some continued questioning along that line counsel for the state inquired into his Stephenson relationship.

Q. "Now you say you met Stephenson three years ago last September?"

A. "Or October, I won't be positive."

Q. "Where did you meet him?"

A. "I met him at what is known as the Schultz Apple Orchard at Laurel."

Q. "Were you down there with him?"

A. "I met him there."

Q. "What was that occasion that took you there?"

A. "I was joining the Knights of the Klu Klux Klan."

Q. "Yes, you were going in to the Klan and Stephenson was their organizer was he, and then did you become an organizer afterwards?"

A. "I did not."

Q. "Well, what was the occasion that took you to Stephenson's place so frequently before the legislature met?"

A. "We had matters of mutual interest."

Q. "What?"

A. "Politics."

Q. "Anything else?"

A. "Yes."

Q. "Politics?"

A. "That is all."

Q. "But what were your political schemes you were working at?"

Objection.

A. "Well, we were trying to elect our friends."

Q. "And who were your friends?"

Mr. Holmes. "To which the defendants object."

Q. "Members of the legislature?"

Defendants' objections overruled.

A. "Well, most every one that was elected."

Q. "Most every one that was elected."

The Court. "Gentlemen, I wish you would refrain from repeating."

Q. "Now this was during the primary campaign, was it?"

A. "Yes, sir."

Q. "And you were engaged in no other business at that time except politics?"

A. "None whatsoever."

Q. "And working exclusively with Stephenson during that whole time?"

A. "Oh no, I had interests down in my home county."

Q. "And he was interested in that?"

A. "Just as a general proposition."

Q. "In other words, you were his political henchman?"

Defendant's objections overruled.

Q. "Is that right?"

A. "I was one of his political friends."

Regarding his contacts with other defendants.

Q. "Now did you see Gentry and Klinck at Stephenson's office?"

A. "Yes."

Q. "Did you see them around the legislature?"

A. "I could not say that I did, no."

Q. "Were you with them at Stephenson's office during this time?"

A. "Oh at times when I have been in there they were present."

Q. "Well, you say you were there every day?"

A. "Yes."

Q. "They had nothing to do with the manipulations of the legislature that was going on?"

A. "Not in the least."

Q. "Now did you see Stephenson around the legislature at that time?"

A. "I don't believe I ever seen Mr. Stephenson around the legislative halls."

Q. "Well, did you see members of the legislature at Stephenson's office on these occasions when you were there?"

A. "Yes."

Q. "How many, about?"

A. "Well, I don't know that I seen all of them there."

Q. "How many?"

A. "Give me a roster and I will name every one that was there."

Q. "And that was the manipulation that was interesting you at that time, was it?"

A. "I say do you want me to answer, let me finish?"

MR. R. K. KANE. "Read the question."

(Question was read to the witness by the reporter.)

A. "No, I don't know that it was."

Q. "When were you subpoenaed as a witness in this case?"

A. "Last week."

Q. "Who subpoenaed you?"

A. "Mr. Holmes."

Q. "Who?"

A. "Mr. Ira Holmes."

Q. "Where were you when the subpoena was served?"

A. "In his office."

Q. "How did you happen to be in his office?"

A. "Was told to go there."

Q. "Who told you to go there?"

A. "By Mr. Rodman."

Q. "Who is Mr. Rodman?"

A. "Well, right over there he sits."

Q. "Where were you when Rodman told you to go to Holmes' office?"

A. "I believe I had seen him in his office."

Q. "Indianapolis?"

A. "Oh pardon me, he had written me and told me to go to Mr. Inman's office, and which I did, and then was told to go to Mr. Holmes' office."

Q. "When did that happen?"

A. "Oh, that was a week or so ago."

Q. "Had you talked to anybody else about this matter before that?"

A. "I had talked to Mr. Inman."

Q. "When?"

A. "I don't know how long ago it has been since—well, before the trial started, or just at the time the trial started, when they were trying to get the jury."

Q. "Where were you when you had that conversation with Inman?"

A. "In his office."

Q. "In Indianapolis?"

A. "Yes."

Q. "Was that the first time you had had a conversation about this case?"

A. "In a general way."

Q. "Where did you have those general conversations?"

A. "Oh, every where, at home and every place else."

Q. "Had you talked with Strader, Foster Strader, about this case?"

A. "Only in a general way."

Q. "When did you talk with him?"

A. "Ever since the case became public."

Q. "How many conversations have you had with Strader?"

A. "It would be impossible for me to tell you."

Q. "You have talked with him constantly?"

A. "No, not constantly."

Q. "He is Stephenson's private secretary?"

A. "Not to my knowledge."

Q. "One of his employees?"

A. "I could not say."

Q. "And been active in framing up this defense?"

Objection sustained.

Q. "In preparing this defense, then?"

A. "Not to my knowledge, however."

Q. "How many times has he talked to you about your testimony in this case?"

A. "Never at any time."

Q. "Never at any time?"

A. "Never."

Q. "Do you know Carl Losey?"

A. "Yes."

Q. "Have you talked with him?"

A. "Only in a general way."

Q. "How often?"

A. "I could not say."

Q. "When did you first talk to Losey?"

A. "I have known Losey for a long time, possibly."

Q. "When did you first talk to Losey?"

A. "I don't have the slightest idea."

Q. "About this case, I mean?"

A. "I expect it happened."

Q. "You have talked with him several times since?"

A. "I presume."

Q. "He is one of Stephenson's employees?"

A. "I don't know."

Q. "And one that has been active in organizing this evidence?"

A. "I could not say as to that."

Q. "Have you talked with Stephenson personally about this matter?"

A. "Not about the testimony, no."

Q. "You have talked to him about the case though, have you?"

A. "Yes, in a very general way."

Q. "Have you visited him since he has been in jail?"

A. "Yes."

Q. "How many times?"

A. "I could not say."

Q. "About how many times?"

A. "Probably three or four times."

Q. "No more than that?"

A. "I could not say, could have been a half dozen, may be two."

This line of questioning concluded with the following:

Q. "In these conversations that you had with Stephenson, did he tell you that he had an alibi in this case for defendants?"

Mr. Holmes. "The defendants object to that as not being cross-examination."

The court sustained the objection of the defendants, to which ruling of the court the state, by its counsel, at the time took an exception.

Q. "He never told you?"

A. "He didn't tell me anything —"

With reference to witness' testimony that he had seen Miss Oberholtzer in the W—— Hotel in a room drinking with Stephenson thus supporting the desperate effort of the defense to break down the girl's thoroughly corroborated story, he testified:

Q. "Now when you got to the room you say Madge Oberholtzer and Stephenson were in the room?"

A. "When I got in there, yes."

Q. "And when you got in —"

A. "I had talked my business with Stephenson on the outside."

Q. "But had no conversation about your business?"

A. "Not this particular business I went to see."

Q. "After you went in you remember you took a drink of gin?"

A. "Yes, he offered —"

Q. "Stephenson had a supply of gin?"

A. "There was a bottle of gin, I don't know whose it was."

Q. "Well, he was handling it?"

A. "No, I don't know as he was."

Q. "Who suggested you have that drink of gin?"

A. "I don't recall who made the suggestion."

Q. "Did you see any bottle of gin before it was offered?"

A. "No, I don't recall."

Q. "Did you suggest you were a little dry, and would like to have a drink?"

A. "No, I don't think I suggested that."

Q. "But you are very positive that you took a glass of gin, and that Madge took a drink?"

A. "Yes, sir."

Q. "Now don't you know there is not a word of truth in that, that you didn't see that girl at that hotel at all —"

Mr. Holmes. "To which the defendants object."

Mr. Kane continued the question. "And that the statement that gin was drunk at that time is a plain lie, don't you know that?"

A. "No, sir."

Mr. Holmes. "We object to that, your Honor."

Q. "And that you came here for the express purpose of committing perjury, and that every word you said on that subject is a lie?"

A. "You are not big enough to tell me that on the street."

Of course no idea of the impression of this witness' testimony or the lack of it can be conveyed to the reader through the medium of the printed page. Nevertheless, it may be said that in this cross-examination the manner of the counsel in response to that of the witness was one of the most effective of the whole trial, equal perhaps to that of Judge Charles Cox's interrogation of Dr. S.

The Court. "Answer the question, and you can do what you please on the street."

Mr. Kane. "Yes, I will meet you on the street."

The Court. "Go ahead and answer the question."

As to his friendship with Stephenson his testimony showed:

Q. "Been intimate?"

A. "Very."

Q. "Pretty close friends?"

A. "Very."

Q. "And want to help him out?"

Mr. Holmes. "The defendants are objecting."

A. "Not only what is right and what I know."

Q. "You are here to help him out?"

A. "In all I can."

Q. "And that is your business?"

A. "My business; if my testimony will do him any good he is welcome to it."

Q. "But you would go any limit in any matters and testify to anything to do that?"

A. "Honorably."

Mr. Holmes. "We object to that.

MR. R. K. KANE. "We will see about the honorably part."

MR. INMAN. "If your Honor please, I want to move that the remark of counsel made before this jury be stricken out."

THE COURT. "That may go out."

THE COURT. "Go ahead."

Q. "Have you ever seen any other girls in Stephenson's office when you visited there?"

A. "Yes."

Q. "How many?"

A. "Oh I could not tell you how many."

Q. "Did you know any of them?"

A. "Yes, sir."

Q. "Who were they?"

A. "Oh I have seen a Mrs. Stubbs that lives in Irvington, Mrs. Martha —"

Q. "Mrs. Martha Stubbs?"

A. "I won't say sure as —"

Q. "Who else?"

A. "I have seen Mrs. Martha Marson and Miss Strator."

Q. "And who else?"

A. "Oh I can't recall the names, I have saw several single men and women when I have been there, I don't recall."

Witness was questioned as to the number of times he had been in Stephenson's office and regarding the people he had met there.

A. "Oh, I was not introduced to—I remember one evening —"

Q. "Just answer my question?"

A. "Well, there was quite a number of people in his office one evening watching a parade, and he introduced me to everybody that I didn't know."

Q. "What kind of parade was that?"

A. "As I recall, it was a Klan parade."

Q. "And you met a lot of people?"

A. "In his office; we were watching the parade."

The entire purpose of this cross-examination had been accomplished. The witness was matched by his equal in size who addressed him with questions with rapidity and force.

J. H. Lambert, an employee of the W. Hotel, which during his power was one of Stephenson's places of habitation, testified that about midnight March 15th, the date of the fatal incident, he had gone out in front of the hotel to purchase a newspaper and saw Madge Oberholtzer sitting in a big Cadillac car alone and that she had spoken to him. This, if true, would have entirely contradicted the dying declaration and would have gone to show that the girl went willingly upon the expedition.

Here follows just a portion of this witness' direct examination:

Questions by Ira Holmes.

Q. "And when you saw her out in front, where was she at that time?"

A. "She was in a car, automobile."

Q. "In an automobile? When was that that you saw her out in front in an automobile, if you know?"

A. "The occasion was March 15."

Q. "On March 15?"

A. "Very late at night."

Q. "And what was she doing in the automobile on March 15?"

A. "Sitting there doing nothing."

Q. "In what part of the automobile was she in when you saw her?"

A. "Sitting in the front seat."

Mr. Christian. "How is that?"

A. "The front seat."

Q. "You said she was sitting on the front seat; now was anybody with her in the automobile at that time?"

A. "No one."

Some additional questions ending with:

Q. "Then what did you do?"

A. "I passed on into the hotel."

Q. "Were there other people on the street at that time in front of the hotel and in that neighborhood?"

A. "I dare say, it being about eleven-thirty or somewhat before midnight."

Mr. Holmes. "You may cross-examine."

Cross-examination.

Questions by William H. Remy.

Q. "Mr. Lambert ——"

A. "Yes."

Q. "You have recently been promoted to Assistant Manager of the W. Hotel, that is, within the last two weeks, is it?"

A. "Yes."

Q. "Do you know whether Mr. Stephenson has an interest in the W. Hotel, or did have one?"

A. "Financial interest?"

Q. "Yes."

A. "He has not to the best of my knowledge."

Q. "To the best of your knowledge he has not. Do you know whether he ever did have any?"

A. "I am certain myself he didn't, never did have."

Q. "He maintained a headquarters at your hotel for some time, did he not?"

A. "It might have been popularly known as headquarters, but he stayed in a room under his name various periods of time, such as a few days or a few weeks."

Q. "Occupied a room there all the time, did he?"

A. "No. I just said he occupied a room for a short time."

Q. "And during the month of January or February you say you saw her in the W. Hotel?"

A. "Yes, January or February, the last of January or first of February probably."

Q. "You don't recall the exact time?"

A. "No, I don't."

There was danger to the defense in this sort of testimony. The girl was dead and could interpose no denial save that of her declaration. However, had an hour and date been given it would have afforded to the State the opportunity at least of searching back for contradictory evidence. If by chance the whereabouts of Miss Oberholtzer could possibly have been recalled by some one on such and such a date and hour the witness' testimony could have been obliterated more easily.

Q. "Now had you ever seen her out in front of the W. Hotel in an automobile before this time?"

A. "No."

Q. "Never did?"

A. "No, this time I mentioned is the only time."

Q. "You are very sure that this is the night you saw her there?"

A. "I am certain of that, because, when I heard the details of the case later on I ——"

Mr. R. K. Kane. "The state moves the Court to strike that last statement out."

The Court. "That may go out."

Q. "Now whom did you first relate what you have just related to the jury, to whom did you first tell that?"

A. "To whom?"

Q. "What?"

A. "To whom?"

Q. "Yes."

A. "The jury."

Q. "To the jury? No one ever knew what you have just told the jury except yourself; you have remained silent on that all the time, have you?"

A. "I have."

Q. "And did you read about this case in the newspapers at the time it occurred?"

A. "I did."

Q. "At that time you said nothing about it?"

A. "I did not."

Q. "You knew that the authorities in the city of Indianapolis were trying to find out all they could about this case?"

A. "Knew that who?"

Q. "That the authorities, the police department and prosecutor's office were trying to find out about it, didn't you?"

A. "I did."

Q. "Did you ever get in touch with any one as to what you knew about it?"

A. "No, I didn't."

Q. "Never told it until this morning?"

A. "That is correct."

Q. "You didn't? Whom did you tell it to before you came up to Noblesville?"

A. "No one."

Q. "No one. Did you see Mr. Klinck or Mr. Gentry with Mr. Stephenson that night?"

A. "No, neither one of the three."

Q. "Neither one of the three? And you never said a word about it to any one until you got on the stand just now?"

A. "That is true."

Almost enough to end here. "To whom have you talked about this case?" has amply served its purpose.

Q. "Now do you know how they came to—that these men subpoenaed you to come up here and tell this story that you didn't see any one of them that night, and if you have never spoken of it to a living soul before this time?"

A. "No, but I can guess."

Q. "You can just guess?"

A. "Yes."

Q. "Well, this is a trial and we can't guess about these matters."

Further questioning continued and after a time:

Q. "Now on the night—you have a news-stand in the W. Hotel, have you not?"

A. "We have."

Q. "And all the editions of the newspapers are sold on the news-stand clear inside the lobby of the W. Hotel?"

A. "Almost."

Q. "And what you went out there on this particular night was to buy a newspaper out on the sidewalk?"

A. "Yes."

Q. "Now the W. Hotel lobby is situated some distance back from the sidewalk, is it?"

A. "It is, yes."

Q. "And then there is a corridor that runs out to the sidewalk?"

A. "That is it."

Q. "Now the desk is clear back at the very—at the north end of the lobby, is it not?"

A. "Yes."

Q. "That is the farthest point in the lobby away from the sidewalk?"

A. "It is."

Q. "How far is it from the office, or the desk, out to the sidewalk?"

A. "It is a matter of one hundred fifty feet."

Q. "One hundred fifty feet?"

A. "Clear back to the alley, in fact."

Q. "And where was the place where you worked when you were there?"

A. "At the desk."

Witness continued to testify admitting that Stephenson frequented the hotel; that he was arrested by the police in his rooms at the W. Hotel and finally:

Q. "And when you did learn of this case, but you never said a word about it to a living soul?"

A. "Don't misconstrue me there now; I mentioned my part to no living soul; yes, that is a fact."

Q. "You never mentioned your part to a living soul; in other words, you never mentioned the fact that she spoke to you to a living soul?"

A. "That is right."

Q. "Even if Holmes and counsel called you on the witness stand and in direct examination asked you what, if anything, had happened, he didn't know what had happened or what you would testify to?"

A. "He didn't know."

Q. "No, he had no means of knowing that, did he?"

A. "No, he had not."

Q. "Because you had never told anybody?"

Mr. Inman. "Now he said so a half dozen times."

Q. "Who subpoenaed you to come up in this case?"

A. "A deputy, I imagine."

Q. "A deputy, what did he look like?"

A. "Oh, a man of short stature."

Q. "Dark hair?"

A. "Dark hair; in fact, his name was Losey."

Q. "Losey? Yes, Carl Losey?"

A. "That was him."

Q. "He subpoenaed you to come up here; did you talk to him about this case?"

A. "I did not."

Q. "Do you know whether or not Losey is one of Mr. Stephenson's henchmen?"

Objection from defendants as to use of word "henchmen" overruled.

And so on ran the questioning.

In the State's rebuttal it was shown by additional medical testimony that many of the authorities referred to by the defense medical experts, were not dependable at all either in the field of toxicology or in the matters under dispute. Dr. R. N. Harger testified that several of these authorities were not to be found upon the lists cited in the office of the Surgeon-General of the United States which he said was the most complete and authoritative in the world. Following this, Dr. Harger who was not a medical expert but a chemist and toxicologist was cross-examined by the defense.

Cross-examination.

Questions by Eph Inman.

Q. "Doctor, is it improper for me to call you Doctor, or shall I call you Professor, I will leave that to you?"

A very clever way to begin. Defense counsel will discredit the expert if possible.

A. "I received, in 1922, from Yale University, the title of Doctor of Philosophy; the term Doctor of Philosophy is the highest degree conferred by an American University."

Q. "Now since you have given me the definition of Doctor, may I call you Doctor?"

THE COURT. "Oh go ahead, gentlemen; objection sustained to that question; put your questions."

Mr. Inman then proceeded to interrogate the witness at greath length, finally turning to medical authorities.

Q. "Witthaus wrote his work fourteen years ago, didn't he?"

A. "That is right."

Q. "You still regard that as an authority?"

A. "Up to that time."

Q. "But in the face of the developments of science and advancement of science the last fourteen years, do you still regard Witthaus as an authority?"

A. "Not when he—not in regard to the percentage of recoveries, no sir."

Q. "No, you don't regard him as an authority on that?"

A. "That is, of the percentage of recoveries since his book was published."

Dr. Harger had on his direct rebuttal examination testified regarding the office of the Surgeon-General of the United States and had said it contained the most authoritative list of toxicologies in the world. Mr. Inman's next move was a brilliant sortie. Having departed for a time from the general field of authorities, counsel for the defense suddenly came back with an apparently unimportant and simple question. Instead of asking who was surgeon-general of the United States or whether or not the witness was acquainted with or knew of General Ireland he asked him "who is M. E. Ireland." Counsel here tried desperately to discredit the expert in his own field. The reader may watch the developments.

Q. "Do you know who M. E. Ireland is?"

A. "I believe not."

Q. "You don't?"

A. "No."

Q. "You never heard of him?"

A. "I don't recall that I have, no, sir."

Q. "Why, you know, don't you he is the Surgeon-General of the United States?"

A. "Mr. Ireland; yes, that is correct."

Q. "That refreshes your memory?"

A. "Yes, that is correct."

Q. "Do you know Tice?"

A. "I am not specially familiar with Tice, no sir."

Q. "You are not familiar with Tice?"

A. "No."

Q. "Does he write Toxicology or Pharmacology, or either?"

A. "Tice?"

Q. "Yes."

A. "I said I am not specially familiar with the works of Tice."

Q. "Are you in a general way familiar?"

A. "Not with the works of Tice, no."

Q. "Do you know whether he is a good one or a bad one?"

A. "I am very sure that he is not an authority of any note on Toxicology."

Q. "It is only the ones that you have in mind and that you named, that you think are authority on Toxicology, and those that you don't know about, they are not authority?"

A. "I read, or try to read, the list of toxicologists which are considered authoritative—by the Library of Congress, the surgeon-general's office, and of such lists in Toxicology as Peterson, Haines and Webster and Blythe; these last books came out in 1920; they make the list of the principal toxicologists."

The witness scored here. Counsel was evidently mentioning names at random in the hope that the witness would acknowledge some as an authority which the cross-examiner could directly reveal to the jury was not one. Later on the witness beat counsel at his own game by picking a veterinary from his list.

Q. "Now is he or is he not a recognized authority? That is just a matter or argumentative statement on the part of the witness, just his own opinion about it?"

A. "No, sir, not at all."

Q. "Do you know Hare?"

A. "I know of no Hare toxicologist."

Q. "Do you know of Hare pharmacologist?"

A. "I am not familiar with it specially."

Q. "Not familiar with it specially?"

A. "No."

Q. "Do you know Hare on Therapeutics?"

A. "I am not a specialist in therapeutics, so I don't know Hare."

Q. "So you don't know Hare on either branch?"

A. "I know of no Hare on Toxicology."

Q. "You don't say Hare does not exist, do you?"

Mr. Remy. "The State objects to that question."

The Court. "The witness can answer."

A. "Certainly not."

Q. "Do you know Santan?"

A. "Santon?"

Q. "Santan?"

A. "Not as a toxicologist."

Q. "Do you know Pfingst?"

A. "Not as a toxicologist."

Q. "You don't know him?"

A. "No."

Q. "You don't know that he has written in German and English both, one of the greatest toxicologies ever written in the world, along in 1923?"

A. "The greatest German work on toxicology is by Cobert."

Q. "I didn't ask about the greatest. You don't know that this man Pfingst wrote in German and English one of the greatest treatises on toxicology that has ever been

written, and that that was written in 1923, you don't know that?''

A. ''I do not.''

Q. ''Why, I will ask you if you have not heard that this man was the Kaiser's physician when he was on the throne?''

A. ''I am not acquainted with German physicians specially.''

Q. ''Well, you know that some of the German writers on toxicology, pharmacology and therapeutics are among the greatest if not the greatest writers in the world?''

A. ''Cobert is on toxicology.''

Q. ''Is that the only one you know?''

A. ''Cobert is the principal German work on toxicology.''

Q. ''He is the principal one?''

A. ''Yes.''

Q. ''But you don't know about this other man at all?''

A. ''I am not familiar with him.''

Q. ''Do you know Cushney?''

A. ''Yes.''

Q. ''Who is Cushney?''

A. ''Cushney is a pharmacologist.''

Q. ''Where?''

A. ''I have forgotten which school he is connected with; he has written a text on pharmacology which we use in the Indiana School of Medicine for student use.''

Q. ''Is he an American?''

A. ''Cushney?''

Q. ''Yes.''

A. ''My recollection is that he is an Englishman, but I am not sure.''

Q. ''That is your recollection?''

A. ''I am not positive upon that point.''

Q. "When did he write last; what is the latest revision of his book?"

A. "His latest edition came out quite recently; somewhere between 1920 and 1924."

Q. "Do you know Solomon?"

Here the witness won a point. Defense experts had testified at great length concerning Solomon.

A. "Not Solomon; Sollmann."

Q. "How do you spell it?"

A. "As I recollect, as I remember, it is S-o-l-l-m-a-n-n."

Much of this cross-examination is omitted to avoid repetition. It continued for a long time covering the same ground hither and thither among the real and alleged authorities relative to toxicology.

Q. "Do you know Landers?"

A. "Not Landers; Lander."

Mr. Inman. "Strike out the 's.'"

A. "Yes."

Q. "You know Lander?"

A. "Oh there is a Lander."

Q. "Where does he live?"

A. "He is an Englishman."

Q. "And is he not ——"

A. "Well, for human toxicology I would say not very important; he wrote a toxicology for veterinary surgeons."

Q. "Do you know Clark?"

A. "Clark's Toxicology?"

Q. "Yes?"

Q. "Do you know Blanford's work on toxicology?"

A. "Blanford's work on toxicology?"

Q. "Yes?"

A. "No, I am not familiar with that."

Mr. Inman. "Well, that is all."

Q. "Do you know Chapman?"

A. "I am acquainted with no Chapman's Toxicology which could be considered as an authority."

Q. "Well, are you acquainted with Chapman's Toxicology which would not be considered as authority?"

A. "I am not."

Q. "You don't know anything about that?"

A. "I am not familiar with Chapman's Toxicology."

Q. "So you have not read it at all?"

A. "I don't pretend to."

The author desires to state that in the preceding cross-examinations for the sake of brevity, in the majority of cases the long objections interposed either by the State or defense between questions and answers are omitted. Too, in some instances it was necessary to merge together those portions of the same cross-examination pertaining to certain lines of inquiry eliminating without comment the intervening unrelated interrogations.

CHAPTER 28

AARON SAPIRO v. HENRY FORD, AND THE DEARBORN INDEPENDENT

The recent trial of Aaron Sapiro v. Henry Ford and the Dearborn Publishing Company was a very remarkable one, not alone because of the prominence of the litigants but also by reason of the importance of the issues, in the number of libels embraced in the declaration, of witnesses sworn and in the extent of the territory from which they were drawn.

The Dearborn Independent was a village weekly until 1919, at which time Henry Ford purchased it. The Dearborn Publishing Company was then organized and the Dearborn Independent changed into a weekly magazine with the sub-title "The Ford International Weekly." It was, however, in no sense a trade journal but soon took its place as a national weekly magazine with a circulation running well toward a million copies.

In 1920, there began to appear in its articles attacks on Jews and the Jewish race. These were subsequently printed in book form and sold on the street corners in America. Translations into various European languages were made and sold for nominal sums throughout Europe. After a period of about two years these publications in the Dearborn Independent ceased with the suggestion that they would later be resumed. The books, however, were continued on sale.

Aaron Sapiro was born and reared in San Francisco, was educated in a Rabbinical Seminary but left that institution to enter upon the study of law. Upon being graduated his services were enlisted by the then Director

of Public Marketing of California. This contact resulted in his lively interest in the marketing problems of the farmers.

Co-operative marketing had theretofore been a theory tried in various parts of the country with indifferent success. As a result of Sapiro's studies, he formulated new and definite ideas upon this subject. He began to advocate the establishment of co-operative organizations for the marketing of particular commodities only, instead of the marketing promiscuously of all crops. He advocated further the organization of the growers of particular commodities throughout the section or sections of the country in which that commodity was produced. He formulated a plan for the formation of such associations and eventually framed a uniform law which was adopted by practically every state in the Union for the creation and government of such associations.

Starting April 12, 1924, the Dearborn Independent began publishing articles attacking the therein alleged Jewish exploitation of farmers' organization and the therein alleged monopoly traps operating under guise of "Marketing Associations," and attacking Sapiro and his co-operative marketing activities.

Through William Henry Gallagher, of Detroit, Sapiro subsequent to the publication of these articles filed an action of libel in the United States District Court at Detroit against Henry Ford and the Dearborn Publishing Company. Sapiro's declaration contained twenty-one counts—twenty based upon definite allegations of twenty different articles, and the twenty-first on a conspiracy to defame. In many instances each count declared upon several libels in a certain article, one hundred and forty-one libels in all being declared. This comprised ninety-two printed pages; the amended plea

of the defendant, filed upon the eve of the trial, contained two hundred and seven printed pages.

The trial began on March 15, 1927. Senator James A. Reed of Missouri, appeared as chief counsel for the defense. With him were Richard J. Higgins and Raymond E. Watson of Kansas City, John Bruce of Kentucky and Stewart Hanley, Clifford B. Longley, Wallace R. Middleton and Ward N. Choate of Detroit.

This case after a long and tedious hearing was finally settled out of court and dismissed to the apparent satisfaction of all parties, the Dearborn Independent as well as Henry Ford himself publishing a retraction of the alleged libels.

An excellent illustration of nullifying an adverse witness' direct examination by an appeal to his pride is afforded by the testimony of John L. Buckley taken in this notable libel suit.

The libelous articles had charged that the Jews through Sapiro had sought to gain control of the Kentucky tobacco market. In its plea of justification, the Dearborn Independent offered to show that Sapiro had conspired with the tobacco warehousemen of Kentucky to foist the property of the warehousemen onto the farmers' organization at fraudulent prices. Stone and Buckley were prominent warehousemen. The farmers' association bought their properties and Stone later became the general manager of the farmers' organization.

Buckley was offered as a witness by the defendant and upon direct examination testified that all of the warehouses including his own, had been sold to the farmers' association at exorbitant prices and that his firm had sold out in the expectation of procuring positions with the farmers' association.

Upon cross-examination he was first confronted with his testimony in another case where he had stated that

he had been induced to sell out upon the argument, among others, that the introduction of the co-operative system would stabilize the tobacco market and would increase farm values, and that he as an extensive owner of farm properties would benefit thereby; that he had been solicited by his partner, Stone, to aid in promoting the organization of the association and that he had actually done so.

The cross-examination by William Henry Gallagher, then proceeded as follows:

Q. "Now when the organization was formed and Mr. Stone asked you to join in the promoting of it, did anybody else ask you to do so?"

A. "No one, except Mr. Passaneau, the State organizer."

Q. "What did he say to you to induce you to foster the organization?"

A. "That it was a much better way to market the tobacco than we had been accustomed to marketing it, and that the grower could handle sales better and the usual line that you use on the farmer when you want to get him to sign on the dotted line."

Q. "What do you mean by the 'usual line.' "

A. "Well, the usual line when you go to solicit the farmer to join anything; you tell him how badly he is treated, and that the way he has been selling the tobacco that he does not get what it is worth, the people who buy it from him get all the money and he hasn't made anything, and make him believe he is a very much abused child, and by adopting your method, he will be in a much better position."

Q. "That was what Passaneau told you?"

A. "Along that line."

Q. "Were you at that time a mature man yourself?"

A. "Yes."

Q. "At that time, were you able to form your own judgment as to the correctness of the arguments Mr. Passaneau gave you?"

A. "Yes, sir."

Q. "You had had many years in the tobacco business yourself?"

A. "Yes."

Q. "And you knew that there had been a class of men that grew up in the warehouse business, who had made money from the handling of the farmers' products?"

A. "Yes, sir."

Q. "And after listening to what Mr. Passaneau had to say to you and what Mr. Stone had to say, you did lend your support to the association movement?"

A. "Yes."

Q. "And you yourself then went out and solicited members for the association?"

A. "Yes, sir."

Q. "And when you solicited men to join the association, what did you say to them?"

A. "Same thing."

Q. "The same that Passaneau had said to you?"

A. "Yes."

Q. "Were you honest and sincere in the statements and representations you made to the farmers, upon your part?"

A. "Yes, sir."

Q. "Now at the time that it was projected that this association be formed, the farmers who were invited to join the organization, were told that it was proposing that the association take over the warehouse properties, was it?"

A. "Yes, sir."

Q. "And I presume that you told those farmers that you solicited that fact yourself?"

A. "Very probably."

Q. "And the fact was doubtless published in the papers at the same time?"

A. "I don't know that it was published in the papers, but most everyone who would make a speech about the forming of the association would say that the warehouses would be taken over by the association for the use of the farmers."

Q. "I understood you to say there were meetings of warehousemen held in your office?"

A. "Yes."

Q. "In other words, there was an exchange of views as to what the respective warehousemen thought was the fair value of their respective properties—is that right?"

A. "Yes, sir."

Q. "Was there any suggestion upon your part at that time that the warehousemen ought to try to put one over on the association and turn the warehouses over to it at an exorbitant price?"

A. "No, sir."

Q. "Did anybody make that suggestion to you?"

A. "No."

Q. "At that time you fixed a value for your own property?"

A. "Yes."

Q. "That value was $275,000.00?"

A. "Yes."

Q. "And were you honest and sincere in placing that valuation on it?"

A. "Yes."

Q. "Was there any intent upon your part, at that time, to defraud the association in the transfer of the warehouse property to them?"

A. "No, sir."

Q. "At that time, you had the purpose and disposi-

tion to deal fairly and honorably with this organization of farmers, had you not?''

A. ''I always deal honorably and fairly with every man with whom I come in contact.''

Q. ''And you had the intention at that time to deal fairly and honorably with this organization?''

A. ''Yes, sir, if I had any transactions with them.''

Q. ''You knew there were sixty or seventy thousand farmers who were taking over that property of yourself, did you not?''

A. ''Yes.''

Q. ''And you had no disposition at all to practice any fraud upon that body of men had you?''

A. ''No.''

Q. ''You wouldn't say that you had the purpose of getting all you could for your property even though by doing so you would be defrauding your fellow citizens?''

A. ''I have never attempted to defraud in any transaction, either with the Burley Association or any other set of men, that I came in contact with.''

Q. ''And you would not attempt to sell your property to the Burley Association, or to anybody else at a price which would be a fraud upon the other men, would you?''

(Objected by counsel for defendants to the question as improper and discourteous.)

Q. ''Mr. Buckley, you do not deem it a discourtesy upon the part of a lawyer to ask a question that gives you an opportunity of exonerating yourself from any culpability for dishonorable practices?''

A. ''I was not aware of the fact that I needed any opportunity to exonerate myself from committing any fraud, as I had committed none.''

Q. ''So there was no fraud practiced by you upon the association, in your sale of the warehouse of it, was there?''

A. "None whatever."

Q. "And you were no party to any fraud you know of, in effecting that sale?"

A. "No, sir."

Q. "And you would not attempt to sell your property to the Burley Association or to anybody else, at a price which would be a fraud upon the other men, would you?"

A. "I would not attempt any fraud upon anybody in any transaction."

Q. "And when you fixed the price of $275,000.00 as the value of your buildings and the properties sold to the Burley Association, that price did not, in your judgment at the time, intend any fraud upon the association, did it?"

A. "None whatever."

Q. "And in your discussions of the price, had you and Mr. Stone agreed that that was a fair value?"

A. "Yes."

Q. "And when the time came to sell your properties to the association, what was the price which was submitted to the association as the fair value of your property?"

A. "$250,000.00."

Q. "How did they come about?"

A. "While this meeting was in progress, Mr. Stone beckoned to me and I followed him into one of our other offices and he told he expected he had done something that I would score him right sharply for and I asked him what it was and he says 'They got around me the other day and got me to reduce the value of your property to $250,000.00 and I submitted that proposition to them.' I asked him what in the world he did that for and he said he was over-persuaded and thought possibly

it might have a better effect on the other warehousemen, that they might reduce their property, but there——''

Q. ''Did he say who persuaded him?''

A. ''Yes, Sapiro.''

Q. ''Did he say that Sapiro persuaded him to do so, in order that it might have an effect upon the other warehousemen?''

A. ''Yes.''

Q. ''Now, after Stone reported to you that he had reduced the price in that way, did the appraisers come around there and inspect the property?''

A. ''Yes.''

Q. ''And was their appraisal more or less than your valuation.

A. ''It was more.''

Another example is afforded by a deposition taken in this famous trial. The alleged libelous articles, as well as attacking Sapiro, criticized the set-up of his cooperative system, saying of it ''the machinery was in its operation cumbersome and extravagant.''

Defendant took the deposition of Frank Kiene at St. Paul, Minnesota, with reference to the Minnesota Potato Growers Exchange and the direct examination concluded as follows:

Q. ''I will ask you what in your opinion was the reason for the failure of the Minnesota Potato Growers Exchange to carry on?''

A. ''Too cumbersome machinery and poor sales service.''

The use of the identical language which appeared in the Dearborn Independent, particularly coming from a witness such as was here offered, immediately suggested the following cross-examination by Mr. Gallagher:

Q. ''What were you talking about when you spoke about 'too cumbersome machinery'?''

A. "What is the question?"

Q. "What were you talking about when you spoke about 'too cumbersome machinery'?"

A. (No answer.)

Q. "You spoke of the machinery of the exchange being too cumbersome. What do you mean by that?"

A. "Well, I mean the way it was set up; the way the machinery was set up to handle the business."

Q. "Well, what do you mean by that?"

A. "Well, the way the potatoes are handled, and the warehouse department, and the whole thing from the time the potatoes left the farm until they were marketed."

Q. "Mr. Kiene, when did you first make use of the language 'cumbersome machinery'?"

A. "I don't understand your question."

Q. "You never used the language 'cumbersome machinery' in describing this condition before today?"

A. "I probably have."

Q. "You don't recall that you have?"

A. "I may have."

Q. "You wouldn't swear that you have?"

A. "I may have."

Q. "But you wouldn't swear that you had would you?"

MR. GALLAGHER: "Let the record show that the witness hesitates—how long would you say—thirty seconds."

DEFENDANT'S COUNSEL: "I don't think the witness is hesitating at all. He is taking reasonable time to understand your questions and to recover from the apparent ——"

MR. GALLAGHER: "Embarrassment would you say?"

DEFENDANT'S COUNSEL: "— insult of the question."

MR. GALLAGHER: "Will you answer the question now?"
A. "Whether I had used that word before?"
Q. "Yes."
A. "I do not know whether I have or not."

Don Allen says this happened in Los Angeles.

writing expert said "John Smith Fraser" on hotel register was same as writing on a post card (admittedly the defendant's)

cross-X- Date of hotel register? Apr 15-

Where was post card mailed & written?

Arkansas.

Date? Apr 14.

Same traveler?